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No. 10-110

IN THE

Supreme Court of the United States

JAMES BEN BROWNFIELD,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether a criminal defendant has a Sixth Amendment right to have a jury determine the existence of the statutory aggravating facts upon which a capital sentence is based.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner James Ben Brownfield respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Brownfield's conviction and sentence, *Brownfield v. State*, No. CR-04-0743 (Ala. Crim. App. April 27, 2007), is attached at App. 17a through 104a. The opinion of the Supreme Court of Alabama affirming the judgment of the Alabama Court of Criminal Appeals, *Ex parte James Ben Brownfield, Jr.*, No. 1070255 (Ala. Dec. 23, 2009), is attached at App. 3a through 16a. The order of the Supreme Court of Alabama overruling Mr. Brownfield's application for a rehearing, *Ex parte James Ben Brownfield, Jr.*, No. 1070255 (Ala. Feb. 19, 2010), is attached at App. 1a through 2a.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Supreme Court of Alabama is invoked under 28 U.S.C. § 1257(a). Petitioner has asserted below and is asserting before this Court the deprivation of rights secured by the United States Constitution.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed . . . .

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Alabama's Sentencing Scheme

A trial for a capital offense in Alabama may proceed through three phases:

1. *Innocence/Guilt Phase*

The jury finds the defendant innocent or guilty beyond a reasonable doubt of at least one of eighteen codified capital offenses. Ala. Code § 13A-5-40(a).

2. *Sentencing Phase—Advisory Jury*

If the defendant is found guilty of a capital offense, then the advisory jury must determine whether the defendant committed a capital crime in combination with at least one of ten statutory aggravating facts. Ala. Code § 13A-5-49. The jury is authorized to recommend a death sentence if (1) it finds at least one aggravating fact beyond a reasonable doubt, (2) the aggravating fact(s) outweigh any mitigating circumstance(s), and (3) at least ten jurors recommend death. *Id.* § 13A-5-46(e)-(f). Otherwise, the jury must recommend life without parole. *Id.* § 13A-5-46(e).

The jury must return a written verdict that indicates its sentencing recommendation and the total number of votes for and against the sentence. *Id.* § 13A-5-46(f). The jury is not required to provide a verdict detailing what aggravating facts, if any, were found beyond a reasonable doubt.

3. *Sentencing Phase—Judge*

Final sentencing authority is vested in the judge. The court must "give[] consideration" to the jury's recommendation, but is not bound by it and may override the jury's recommendation. *See* Ala. Code § 13A-5-47(e); *Ex parte Waldrop*, 859 So.2d 1181, 1193 (Ala. 2002) (affirming court's imposition of death sentence over jury's recommendation

of life). The court decides upon a sentence "by determin[ing] whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist." Ala. Code. § 13A-5-47(e).

The judge cannot impose the death sentence unless the jury has found at least one statutory aggravating fact beyond a reasonable doubt. *Ex parte Waldrop*, 859 So.2d at 1188. However "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing." Ala. Code § 13A-5-45(e).

Mr. Brownfield's Trial, Sentencing & Appeal

The State of Alabama charged Mr. Brownfield with three counts of murder in separate cases, which were consolidated for trial. Those counts consisted of (1) murder during a burglary in the first degree, (2) murder of two or more persons pursuant to one act, scheme, or course of conduct, and (3) murder of an individual less than fourteen years of age. App. 120a-125a. On February 25, 2004, a twelve-person jury found Mr. Brownfield guilty of all counts. App. 126a-128a.

1. *Advisory Jury Sentence*

On February 26, 2004, a sentencing hearing for Mr. Brownfield was held before an advisory jury, which would recommend either death or life imprisonment without eligibility for parole. App. 143a-144a.

The jury was instructed to consider the following three, statutory aggravating facts: (1) whether the offense was "especially heinous, atrocious, or cruel compared to other capital offenses," (2) whether "the defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct," and (3) whether the offense was "committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, burglary."[1] App. 185a-188a. The first two facts applied to all three counts, and the third fact applied only to the count involving murder committed during a burglary in the first degree. *Id.* Two of these aggravating facts—regarding common scheme and burglary – were elements of the capital offenses that the jury had found Mr. Brownfield guilty of committing during the innocence/guilt phase of the trial. App. 120a-128a. The third aggravating fact—especially heinous, atrocious, or cruel ("HAC")—had not previously been submitted to the jury.

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[1] The aggravating factors are codified as follows:

- The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping.
- The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses.
- The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct.

Ala. Code, §§ 13A-5-49(4), (8), (9).

During closing arguments, counsel for the State emphasized the HAC aggravating fact, asserting that this fact, in combination with the common-scheme fact, "would outweigh anything that the defendant has offered to you in the way of mitigating circumstances." App. 180a.

In addition to aggravating facts, the court also instructed the advisory jury to consider several mitigating circumstances listed by the court as well as "any aspect of [the] defendant's background and life and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death." App. 191a-192a. The court explained that whether the jurors chose a sentence of life without parole or death "depends on whether aggravating circumstances exist and, if so, whether the aggravating circumstances outweigh the mitigating circumstances." App. 184a.

After receiving these instructions and deliberating, the jury returned a non-unanimous advisory verdict recommending that Mr. Brownfield be punished by death. According to the general verdict form, the vote was eleven for death and one for life imprisonment without parole. App. 129a-132a. There is no indication which mitigating or aggravating facts were found and weighed by the jury.

2. *Fact-Finding and Sentencing by Judge*

The court held a sentencing hearing on April 29, 2004. It found beyond a reasonable doubt all three aggravating facts. App. 148a-155a, 162a.

With respect to two of the aggravating facts that had comprised elements of the offenses previously

found by the jury during the innocence/guilt phase of the trial, the court "concur[red] with the jury's finding." App. 149a, 154a-155a. The court concluded that the burglary aggravating fact was applicable only to the offense of murder during a burglary in the first degree. App. 148a. The court found that the common-scheme aggravating fact was applicable to all three offenses. App. 154a-155a.

With respect to the aggravating fact of "especially heinous, atrocious, or cruel," the trial court found that "the State proved beyond a reasonable doubt that each of the murders of the three victims was especially heinous, atrocious or cruel compared to other capital offenses." App. 153a. The court also found this fact applicable to all three offenses. The court detailed the evidence in support of this aggravating fact and explained that each murder was "a conscienceless or pitiless crime," "unnecessarily torturous to the victim," and involving "brutality" that "exceeds that which is normally present in a capital case." App. 151a.

In counterbalance to these three aggravating facts, the court found one statutory mitigating circumstance: no significant history of prior criminal activity. App. 155a. In addition, the court described several non-statutory mitigating factors, including a "substance dependence disorder," Mr. Brownfield's cooperation with police after his arrest, and his remorse over the murders at issue. App. 160a-161a.

After "consider[ing] the recommendation of the jury in its advisory verdict and giv[ing] it due weight," the court concluded that the aggravating

facts outweighed the mitigating circumstances and sentenced Mr. Brownfield to death for all three offenses. App. 161a-162a.

Mr. Brownfield unsuccessfully moved for a new trial, arguing, *inter alia*, that he had been denied "the right to a trial by a fair and impartial jury" in violation of the Sixth and Fourteenth Amendments. App. 170a.

3. *Appeal to the Alabama Court of Criminal Appeals*

On appeal, Mr. Brownfield's counsel raised several issues, including whether the jury's advisory verdict had violated Mr. Brownfield's Sixth-Amendment rights in light of this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002). App. 111a-119a. The Alabama Court of Criminal Appeals rejected Mr. Brownfield's arguments, holding, in relevant part, that "the limited mandates of *Ring* have been satisfied in this case, because the jury unanimously found at least one statutory aggravating circumstance, making Brownfield eligible for the death penalty." App. 92a-93a.

4. *Appeal to the Alabama Supreme Court*

Mr. Brownfield appealed the decision of the Court of Criminal Appeals to the Supreme Court of Alabama, arguing, *inter alia*, that the jury's advisory verdict had violated Mr. Brownfield's Sixth-Amendment rights in light of this Court's holding in *Ring v. Arizona*. App. 107a-108a. The Supreme Court of Alabama did not address Mr. Brownfield's arguments regarding the Sixth

Amendment.[2] Instead, the Supreme Court of Alabama limited its written opinion to evaluating the admissibility at trial of a court-appointed psychologist's testimony. App. 3a-16a.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The difference between life and death for Mr. Brownfield depended upon a fact found by the judge, instead of a jury. Believing herself to be unconstrained by the Sixth Amendment, the judge found that Mr. Brownfield's crime was "especially heinous, atrocious, or cruel" and then used that significant aggravating fact to condemn Mr. Brownfield to death. Mr. Brownfield's sentence was affirmed according to an erroneous view of the Sixth Amendment: that the sentencing judge can find and consider any statutory aggravating fact (no matter how significant), provided that the jury has previously found a single aggravating fact (no matter how tangential to the judge's final sentencing determination). In states like Alabama, where aggravating facts must outweigh mitigating circumstances before a death penalty can be imposed, judge-found facts are increasing defendants' legislatively prescribed maximum sen-

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[2] The Alabama Supreme Court's failure to address Mr. Brownfield's Sixth Amendment argument under *Ring v. Arizona* does not prejudice his ability to raise that issue before this Court. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973) ("[D]espite the State Supreme Court's failure to address the constitutional issue, it is clear that [defendant's] asserted denial of due process is properly before us" because the defendant raised his objection before the state court).

tences from life to death. This outcomes defies this Court's holdings in *Ring v. Arizona* and *Blakely v. Washington*, which required that a jury find any aggravating fact necessary for imposition of the death penalty and which clarified that the relevant maximum sentence is the one that can be imposed without any additional fact-finding.[3]

The constitutional error in Mr. Brownfield's case has been repeated in state supreme courts throughout the country, leading to conflicting interpretations of the Sixth Amendment in capital cases among the highest state courts. In addition to the Supreme Court of Alabama, supreme courts in Delaware and Florida have erroneously held that a single, jury-found aggravating fact creates a theoretical "maximum" sentence of death. These states' courts then make that theory a reality by allowing a judge to find any aggravating facts necessary to impose capital punishment. In contrast, supreme courts in states including Arizona, Colorado, Indiana, and Nebraska have concluded that capital defendants have a right to a jury trial on aggravating facts used to determine a death sentence.

This Court should grant certiorari in order to resolve a significant dispute among state supreme courts regarding a fundamental constitutional right and to ensure that, before depriving an individual of his life, the State has "suffer[ed] the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of [a defen-

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[3] *Ring* did not address a judicial finding of a prior-conviction aggravating factor, which is not at issue in this petition.

dant's] equals and neighbors, rather than a lone employee of the State." *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004) (internal citation and quotation marks omitted).

II. ALABAMA AND OTHER STATE SUPREME COURTS ARE APPLYING CONFLICTING SIXTH-AMENDMENT STANDARDS IN CAPITAL CASES.

Under the Sixth Amendment (as applied to the states through the Fourteenth Amendment), "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring v. Arizona*, 536 U.S. at 589. At issue in *Ring* was a capital sentencing scheme in which the judge was solely responsible for making findings regarding statutory aggravating facts and mitigating circumstances. Arizona's scheme authorized "the judge to sentence the defendant to death only if there is at least one aggravating circumstance and there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 593 (internal quotation marks omitted). This Court held that "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" by increasing the defendant's punishment beyond life without parole. *Id.* at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)). The Court concluded that the Sixth Amendment applies to "the factfinding necessary to put [a defendant] to death" and therefore does not permit a sentencing judge, sitting without a jury, to find an aggravating fact necessary for imposition of the death penalty. *Id.* at 609.

Ring involved only a single aggravating fact, and the Court therefore did not explicitly address whether a jury need find only a single aggravating fact (which might render the defendant potentially eligible for the death penalty) or whether all aggravating facts that formed the basis of a defendant's sentence must be subject to jury proof. On remand, the Arizona Supreme Court held that *Ring's* mandate called for the submission of all aggravating facts to the jury. It explained:

> A narrow reading of *Ring* [] may permit a judge to decide the existence of additional aggravating factors in the circumstances described by the State. As the State contends, once the government establishes any aggravating factor, a defendant becomes "death eligible" in the strict sense, and establishing additional aggravating factors does not render a defendant "more" death eligible. In our view, however, *Ring* [] should not be read that narrowly. Although the Court there considered a death sentence based upon the existence of a single aggravating factor, we conclude that *Ring* [] requires a jury to consider all aggravating factors urged by the state and not either exempt from *Ring* [], implicit in the jury's verdict, or otherwise established beyond a reasonable doubt.

State v. Ring, 65 P.3d 915, 942-43 (Ariz. 2003).

Courts have subsequently differed in their interpretation of *Ring*, with one state supreme court justice commenting that "*Ring* has raised at least as many questions in the state courts as it has answered." *Duest v. State*, 855 So.2d 33, 51 (Fla. 2003) (Pariente, J., concurring). Alabama's

Supreme Court has repeatedly interpreted *Ring* to require a jury-finding of only a single aggravating fact before allowing the judge to find additional statutory aggravating facts. *See Ex parte McNabb*, 887 So.2d 998, 1006 (Ala. 2004) ("The jury's unanimous finding of one aggravating circumstance is sufficient to satisfy *Ring*."); *Ex parte Hodges*, 856 So.2d 936, 944 (Ala. 2003) (holding that jury's finding of one aggravating fact during innocence/guilt phase of trial was sufficient to satisfy Sixth Amendment, regardless of whether trial court considered other aggravating facts not found by the jury); *Ex parte Waldrop*, 859 So.2d at 1188 (holding that defendant became eligible for death penalty upon jury's finding of single aggravating fact during innocence/guilt phase of trial, and Sixth Amendment was therefore not violated by court's consideration of other aggravating facts not found by jury). Other state supreme courts have reached similar interpretations. *See, e.g.*, *Brice v. State*, 815 A.2d 314, 321-22 (Del. 2003) (accepting State's argument that *Ring* "merely requires the jury to find the existence of one statutory aggravating factor before the judge may consider all aggravating" facts); *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003) (rejecting Sixth-Amendment argument under *Ring* where judge, after recognizing defendant's prior violent felony aggravator conviction, proceeded to find two important aggravating facts that were weighed in calculus of death).

But, in addition to Arizona, other states' Supreme Courts and State Supreme Court Justices have adhered to a contrary interpretation of *Ring*. As the former Chief Justice of the Florida Supreme Court explained:

> [T]he view that the presence of a single . . . aggravating circumstance gives a trial judge free hand to find multiple . . . aggravating circumstances constitutes not only the most narrow reading of *Ring* possible, it is a reading that conflicts with *Ring's* central principle as well. *Ring* is, at its heart, based on the guarantee of the right to trial by jury provided in the Sixth Amendment of the United States Constitution. *Ring, Apprendi*, and these two opinions' predecessor, *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), stressed the essential nature and historical importance of the Sixth Amendment's right of trial by jury. These decisions each determined that the Sixth Amendment required a jury to find the existence of facts that increased a defendant's sentence beyond that allowed by a conviction alone. The *Ring* opinion was especially emphatic in rejecting form over substance in prohibiting a judge alone from making the factual findings actually utilized in sentencing a defendant to death. *See Ring*, 536 U.S. at 604, 122 S.Ct. 2428.

Duest, 855 So.2d at 57 n.24. (Anstead, C.J., concurring in part and dissenting in part). *See also People v. Montour*, 157 P.3d 489, 497 (Col. 2007) ("Because a defendant is not eligible for the death penalty until all aggravating factors are weighed against all mitigating factors, the presence of one *Blakely*-exempt aggravating factor standing alone does not make a capital defendant eligible for the death penalty. . . . Capital defendants have a right to a jury trial on all aggravating facts used

to determine death eligibility."); *Ritchie v. State*, 809 N.E.2d 258, 265 (Ind. 2004) ("The Supreme Court has now made clear that statutory aggravators in Indiana's Death Penalty law are the functional equivalent of elements of a crime, and must be found by a jury beyond a reasonable doubt."); *State v. Gales*, 658 N.W.2d 604, 624 (Neb. 2003) ("*Ring v. Arizona* therefore requires that in order to fulfill the guarantee of rights conferred by the Sixth Amendment, the existence of any aggravating circumstance utilized in the imposition of [the defendant's] sentence of death, other than a prior criminal conviction, must be determined by a jury." (internal citation omitted)).

These conflicting opinions have resulted in different Sixth-Amendment standards in capital cases throughout this country.

III. THE STATE OF ALABAMA VIOLATED MR. BROWNFIELD'S SIXTH-AMENDMENT RIGHT TO HAVE A JURY DETERMINE THE EXISTENCE OF AN AGGRAVATING FACT UPON WHICH HIS CAPITAL SENTENCE WAS BASED.

A. The Sixth Amendment Required a Jury To Find The Statutory Aggravating Facts Upon Which Mr. Brownfield's Capital Sentence Was Based.

Mr. Brownfield's sentence was increased beyond the maximum prescribed under Alabama law according to factual findings by a judge. In affirming this outcome, Alabama's Court of Criminal Appeals followed its State's precedent in holding that "the limited mandates of *Ring* have been satisfied in this case, because the jury unanimously

found at least one statutory aggravating circumstance, making Brownfield eligible for the death penalty." App. 92a-93a. The Alabama Supreme Court declined to address Mr. Brownfield's Sixth-Amendment arguments on appeal. In so holding, the Alabama courts violated Mr. Brownfield's right to a jury trial under the Sixth Amendment.

In light of this Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), it is more evident than ever that all aggravating facts essential to a death sentence must be found by a jury beyond a reasonable doubt. *Blakely* clarified that, when *Ring* referred to the "maximum" sentence that a defendant could receive under the Sixth Amendment, this "maximum" referred "not [to] the maximum sentence a judge may impose after finding additional facts, but [to] the maximum he may impose without any additional findings." *Id.* at 303-04 (discussing *Ring*). The sentencing judge in *Blakely* had found that, in kidnapping his ex-wife, defendant Blakely had acted with "deliberate cruelty" and accordingly sentenced him above the standard range to a term of incarceration of 90 months. *Id.* at 300. In rejecting the judge-made "deliberate cruelty" finding, the Court explained, "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." *Id.* at 304 (internal citation and quotation marks omitted).

This Court's holdings in *Ring* and *Blakely* make clear that any of Alabama's statutory aggravating facts (including the aggravating fact at issue in this case: "especially heinous, atrocious, or cruel")

that are used by a court to impose a death sentence must be found by a jury beyond a reasonable doubt. The finding of a single aggravating fact by a jury does not permit the judge to find additional statutory aggravating facts that enhance a capital defendant's punishment. This is because, under Alabama law, death is the legislatively prescribed maximum punishment for a defendant guilty of a capital offense only if at least two criteria are met. First, the State must establish beyond a reasonable doubt at least one statutorily defined aggravating fact.[4] Second, the aggravating fact(s) must be sufficiently significant to outweigh the mitigating circumstances.[5] Otherwise, the maximum sentence is life without parole.

Alabama courts, including the trial judge in Mr. Brownfield's case, have acknowledged that the mere finding of a single aggravating fact is insuf-

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[4] *See* Ala. Code § 13A-5-45(e)-(f) ("At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. . . . Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole.").

[5] *See* Ala. Code § 13A-5-47(e) ("the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist"); § 13A-5-46(e)(2) ("If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole"); § 13A-5-46(e)(3) ("If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.").

ficient to impose the death penalty. Alabama's Court of Criminal Appeals has explained that "Alabama's statutory sentencing scheme" does not "'presume[]' that death is the appropriate punishment upon the finding of the existence of at least one aggravating circumstance." *Kuenzel v. State*, 577 So.2d 474, 521 (Ala. Crim. App. 1990).[6] The Court of Criminal Appeals has further stated "[a] greater punishment—death—*may* be imposed on a defendant convicted of a capital offense, but *only* if one or more of the aggravating circumstances enumerated in § 13A-5-49 is found to exist *and* that aggravating circumstance(s) outweighs any mitigating circumstance(s) that may exist." *Ex parte Woodard*, 631 So.2d 1065, 1071 (Ala. Crim. App. 1993) (citing Ala. Code §§ 13A-5-45(f), 13A-5-46(e), 13A-5-47(e) (emphases in original))); *see also Ex parte Trawick*, 698 So.2d 162, 173-74 (Ala. 1997) ("The trial court correctly instructed the jury to recommend the death penalty only if it found that the aggravating circumstances outweighed the mitigating circumstances, obviously implying that in all other circumstances the jury was required to recommend a sentence of life imprisonment without parole."). Likewise, the trial judge in Mr. Brownfield's case instructed the jurors that whether they chose a sentence of life

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[6] *See also Cochran v. State*, 500 So.2d 1161, 1178 (Ala. Crim. App. 1984) (aff'd in part, rev'd on other grounds, 500 So.2d at 1179 (Ala. 1985)) ("'In other words, the mere presence of an aggravating circumstance, apparently even in absence of a mitigating circumstance, does not automatically dictate a death sentence. The aggravating circumstance must be found sufficient to support the death penalty.'" (quoting J. Colquitt, The Death Penalty Laws of Alabama, 33 Ala. L. Rev. 213, 318 n.713 (1982)).

without parole or death "depends on whether aggravating circumstances exist and, if so, whether the aggravating circumstances outweigh the mitigating circumstances." App. 184a.

Applying this Court's logic in *Apprendi*, a single aggravating fact under the Alabama Code—if insufficient to outweigh any mitigating factors—does not "increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 496. In Mr. Brownfield's case, if the sole aggravating fact(s) found by the jury did not weigh in favor of death, then the maximum, legislatively prescribed sentence was life without parole. To the extent that additional fact-finding (namely, the finding of the HAC aggravating fact) was used to increase Mr. Brownfield's maximum sentence to death, then that fact should have been found by a jury because it was legally essential to Mr. Brownfield's punishment. *See Blakely*, 542 U.S. at 313 ("[E]very defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.").

The Court of Criminal Appeals therefore erred in holding that the finding of a single aggravating fact—regardless of whether it was sufficient to sentence Mr. Brownfield to death—allowed the judge to find another statutory aggravating fact to count in favor of death. In concluding that Mr. Brownfield may be sentenced to death on the basis of a judge-found aggravating fact, the Alabama Court of Criminal Appeals relied upon the Alabama Supreme Court's decision in *Waldrop*. App. 89a-92a. *Waldrop*, in turn, cited Ala. Code § 13A-5-45 in support of its conclusion that the

judge (purportedly pursuant to *Ring*) can consider aggravating facts not found by the jury. *Waldrop*, 859 So.2d at 1188. That Alabama statute provides "[u]nless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole." Ala. Code § 13A-5-45(f). That statute does not, however, undermine the additional (and constitutionally significant) statutory prerequisite that sufficiently weighty aggravating facts must be found in order for a defendant to be sentenced to death.

In Mr. Brownfield's case, the Sixth Amendment required that any of Alabama's statutorily prescribed aggravating facts that—whether alone or in combination—were held to outweigh mitigating circumstances should have been found by a jury beyond a reasonable doubt.

B. Despite the Sixth-Amendment Requirement that the Jury Find All Statutory Aggravating Facts Essential to Mr. Brownfield's Death Sentence, The Trial Judge Sentenced Mr. Brownfield to Death on the Basis of an Aggravating Fact that Was Not Found By the Jury.

Although the jurors never indicated that they had found the HAC aggravating fact beyond a reasonable doubt, the trial judge concluded that "the State proved beyond a reasonable doubt that each of the murders of the three victims was especially heinous, atrocious or cruel compared to other capital offenses." App. 153a. The court then used this judge-found aggravating fact—in combination

with other aggravating facts—to determine that Mr. Brownfield deserved to die. App. 161a ("[T]he court has engaged in the process of weighing the aggravating and mitigating circumstances as required by law. In each case, the court determines that the aggravating circumstances outweigh the mitigating circumstances.").[7]

Even though two of the aggravating facts considered by the court mirrored the capital offenses found by the jury during the innocence/guilt phase of Mr. Brownfield's trial, the mere existence of those aggravating facts did not render Mr. Brownfield eligible for death. That is because there is no indication that the judge would have sentenced Mr. Brownfield to death solely on the basis of the aggravating facts regarding burglary and a common scheme. To the contrary, the HAC aggravating fact formed the crux of the trial court's conclusion that Mr. Brownfield deserved to die. The trial court acknowledged that the "[t]he law of this state recognizes that it is possible in at least some situations that one or few aggravating circumstances might outweigh a larger number of mitigating circumstances." App. 195a. Then, in its sentencing order, the trial court devoted more than four pages to detailing the especially heinous, atrocious, or cruel nature of the offenses, while spending a paragraph on the other two

[7] The requirement that the jury find all *aggravating* facts upon which a death sentence is based does not necessarily apply to *mitigating* circumstances. *See Apprendi v. New Jersey*, 530 U.S. 466, 490-91 n.16 (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation").

aggravating facts.[8] *Compare* App. 149a-153a *with* App. 148a-149a, 154a-155a. Similarly, in affirming Mr. Brownfield's death sentence, the appellate court quoted at length from the trial court's finding of the HAC aggravating fact and then separately discussed in detail the evidence supporting the HAC fact. App. 94a-99a, 100a-101a. In contrast, the appellate court devoted only two sentences apiece to its finding of the other aggravating facts. App. 99a-100a. The record strongly suggests that the HAC aggravating fact was integral to Mr. Brownfield's death sentence.

C. The Violation of Mr. Brownfield's Sixth-Amendment Rights Was Not Harmless Error.

The failure to submit a sentencing fact to the jury in violation of the Sixth Amendment may be harmless error. *Washington v. Recuenco*, 548 U.S. 212, 222 (2006). But the lack of a procedural mechanism in the trial court for obtaining a jury finding demonstrates that the associated error was not harmless. *Id.* at 218 ("If . . . Washington law does not provide for a procedure by which [the] jury could have made a finding pertaining to [the sentencing factor], that . . . suggests that respondent will be able to demonstrate that the *Blakely* violation *in* [the] *particular case* was not harmless."). One judicial opinion has explained

[8] There are other indications that the burglary aggravating fact, in particular, was not central to Mr. Brownfield's sentence. First, that aggravating fact did not apply to two of the three offenses. App. 148a. Second, the State took the position that the balance weighed in favor of death without the burglary aggravating fact. App. 180a.

this nuance to harmless-error analysis as follows: "if the jury has no means of making the finding, how can a reviewing court presume that the jury would have made that finding regardless of the prohibition against it?" *People v. Harper*, 739 N.W.2d 523, 668 n.17 (Mich. 2007) (Kelly, J., dissenting).

The Sixth-Amendment error in Mr. Brownfield's case was not harmless because Alabama lacks a procedural mechanism for obtaining a jury finding of a HAC aggravating fact to be used in sentencing. The Alabama Code does not provide for an advisory sentencing jury to make specific findings of aggravating facts, and the sentencing jury in Mr. Brownfield's case made no such findings. Even if the advisory jury made recommendations of aggravating facts, Alabama law provides that the sentencing judge—not the advisory jury—must find the aggravating facts to be used in sentencing. *See* Ala. Code § 13A-5-47(e) ("the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist." (emphasis added)). In Mr. Brownfield's case, the judge followed the Alabama Code and found the aggravating facts that sentenced Mr. Brownfield to death. *See, e.g.* App. 149a, 153a ("The court finds that the State proved beyond a reasonable doubt that the defendant committed the capital offense of murder . . . during the commission of a burglary in the first degree. . . . The court finds that the State proved beyond a reasonable doubt that each of the murders of the three victims was especially heinous, atrocious or cruel compared to other capital offenses."). Since the advisory sentencing jury

in Alabama has no means of making a determinative finding of the HAC aggravating fact, it would be nonsensical for another court to presume that the advisory jury would have made that factual finding regardless of the jury's incapacity.

Because the violation of Mr. Brownfield's sentence was not harmless error, his sentence should be vacated.

CONCLUSION

Form would be elevated over substance if a jury finding of aggravating facts, which may have been insufficient on their own to sentence Mr. Brownfield to death, meant that the jury need not find the aggravating fact that condemned Mr. Brownfield. To recognize Mr. Brownfield's Sixth-Amendment right with respect to aggravating facts that may have been insufficient to tip the scale towards death—but then to deny Mr. Brownfield his Sixth- Amendment right with respect to the crucial fact that may have pushed his sentence beyond life without parole—undermines Mr. Brownfield's constitutional right to a jury determination of "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. Such a result would be an end-run around this Court's holding in *Ring* and *Blakely* that would make a mockery of the Sixth-Amendment principles upheld in those decisions.

For the foregoing reasons, petitioner prays that this Court grant certiorari to the Alabama Supreme Court and declare his rights were violated.

Respectfully submitted,

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IN THE SUPREME COURT OF ALABAMA

February 19, 2010

1070225
Ex parte James Ben Brownfield, Jr.
PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS
(In re: James Ben Brownfield, Jr. v. State of Alabama) (Jackson Circuit Court: CC02-99; CC02-100; CC02-101; Criminal Appeals: CR-04-0743).

CERTIFICATE OF JUDGMENT

WHEREAS, the ruling on the application for rehearing filed in this case and indicated below was entered in this cause on February 19, 2010.

Application Overruled. No Opinion. Stuart, J.—Cobb, C.J., and Lyons, Woodall, Smith, Bolin Parker, and Murdock, JJ., concur. Shaw, J., recuses himself.

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment

indicated below was entered in this cause on December 23, 2009:

Affirmed. Stuart, J.—Cobb, C.J., and Lyons, Woodall, Smith, Bolin, Parker, and Murdock, JJ., concur. Shaw, J., recuses himself.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrutment(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 19th of February, 2010.

/s/ ROBERT G. ESDALE, SR.
Clerk, Supreme Court of Alabama

SUPREME COURT OF ALABAMA

No. 1070255

December 23, 2009

EX PARTE JAMES BEN BROWNFIELD, JR.
(IN RE JAMES BEN BROWNFIELD, JR.

—v.—

STATE OF ALABAMA).

STUART, *Justice*.[1]

James Ben Brownfield, Jr., was convicted of three counts of capital murder, see §13A-5-40(a)(4)(murder committed during a burglary), §13A-5-40(a)(10)(murder of two or more persons by one act or pursuant to one scheme or course of conduct), and §13A-5-40(a)(15) (murder when the victim is less than 14 years of age), Ala.Code 1975. The jury, by a vote of 11-1, recommended that

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[1] This case was originally assigned to another Justice on this Court; it was reassigned to Justice Stuart on November 19, 2009.

Brownfield be sentenced to death. After conducting a sentencing hearing, the trial court sentenced Brownfield to death. The Court of Criminal Appeals affirmed Brownfield's convictions and sentence. *Brownfield v. State*, [Ms. CR-04-0743, April 27, 2007] —So.3d— (Ala.Crim.App.2007). We granted certiorari review to determine a material question of first impression concerning Rule 11 .2(b), Ala. R.Crim. P.

Brownfield was arrested for and confessed to murdering Brenda Whitehead McCutchin, Joshua Dewayne Hodges, and Latham Durwood McCutchin. Brownfield pleaded not guilty and not guilty by reason of mental disease or defect. To determine whether Brownfield was competent to stand trial and to determine his mental condition at the time he committed the offenses, the trial court ordered pretrial mental examinations pursuant to Rule 11.2(a)(1) and (2), Ala. R.Crim. P.[2]

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[2] Rule 11.2(a) provides:

"(a) Motions.

"(1) *Competency to Stand Trial.* When a person charged with a crime is before a circuit court, the defendant, the defendant's attorney, or the district attorney may petition for, or the court on its own motion may order, an examination to assist in the determination of the defendant's present mental condition and competency to stand trial.

"(2) *Mental Condition at Time of Offense.* If the defendant has timely raised a defense of 'not guilty by reason of mental disease or defect' either by the entry of a plea or by filing a pre-trial motion pursuant to Rule 15, the court on its own motion may order, or the defendant, the defendant's attorney, or the district attorney may move for an examination into the defendant's mental condition at the time of the offense."

Dr. Melissa Clinger, a psychologist, conducted the examinations.

During the guilt phase of Brownfield's trial, the State called Dr. Clinger as a rebuttal witness to address evidence offered by Brownfield through his expert witnesses about his mental condition at the time of the offenses. Dr. Clinger testified that during the pretrial mental examinations Brownfield informed her that he had a high-school diploma, that he had completed three years of technical school, that he "was doing three different things for one year," that he had worked at a variety of fast-food establishments, that he had held the position of assistant manager once, and that he was a cook at another restaurant and was looking to be promoted to a crew or shift chief. The State then questioned Dr. Clinger as to whether Brownfield had informed her about his activities on December 23, 24, and 25, 2001.[3] The following occurred:

> "[Prosecutor]: All right; did he have any memory at all as to his activities on December 23rd, 24th, and 25th?
>
> "[Dr. Clinger]: He was able to provide me with an account of what he was doing during most of that time.
>
> "[Prosecutor]: All right; was he able to recall getting into a verbal dispute with his sister [Brenda McCutchin] on the 23rd?
>
> "[Dr. Clinger]: Yes.

[3] The murders occurred in the early morning hours of December 24, 2001.

"[Prosecutor]: And what details was he able to provide regarding that?

"[Dr. Clinger]: Well, it was something about-

". . . .

"[Prosecutor]: Dr. Clinger, I believe before lunch, I had asked whether Mr. Brownfield was able to provide you with specific details about the conflict that he had with his sister on December 23rd, 2001; is that correct?

"[Dr. Clinger]: Yes.

"[Prosecutor]: And was he able to provide you with specific details regarding that conflict?

"[Dr. Clinger]: Yes.

"[Prosecutor]: And what sort of details was he able to provide to you?

"[Dr. Clinger]: He was unhappy with his sister and something about that he had given her money and she was supposed to have gone and procured drugs. And then she had taken some or there was something about some problems with arranging with the dealer.

"[Prosecutor]: Okay, and that's what he described occurring on December 23, 2001; is that correct?

"[Dr. Clinger]: Yes.

"[Prosecutor]: Now, with regard to December 24th 2001, could he recall taking a shower at Tammy Farmer's [4] house?

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[4] Tammy Farmer was an ex-girlfriend of Brownfield's.

"[Dr. Clinger]: Yes.

"[Prosecutor]: And what about riding around with Nick Logan?

"[Dr. Clinger]: Yes.

"[Prosecutor]: Now, did he ever recall telling Tammy what had happened?

"[Dr. Clinger]: Well, he told me that he did, yes.

"[Prosecutor]: Now what about on the 25th? Was he able to recall whether or not the Scottsboro Police officers gave him his *Miranda*[5] rights?

"[Dr. Clinger]: Yes.

"[Prosecutor]: And what did he say to that?

"[Dr. Clinger]: He said that he recalled it.

"[Prosecutor]: And did he ever describe to you experiencing rage?

"[Dr. Clinger]: Yes.

"[Prosecutor]: Now, what was the significance to you for the purposes that you've been assigned to this case of the details and the specifics that he was able to provide regarding the 23rd, the 24th, and the 25th?

"[Dr. Clinger]: Well, I was looking for a couple of different reasons. One reason was to see did he have enough information to work with his attorney and another reason is to sort of see

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1986).

was he able to give me a sequential and logical account of what was going on to assess memory.

"[Prosecutor]: Now, the fact that he couldn't remember everything perfectly, did you find that to be unusual?

"[Dr. Clinger]: No.

"[Prosecutor]: Now, based on your inspection and examination of [Brownfield] and pursuant to the orders of this court, have you reached an opinion as to whether the defendant, Ben Brownfield, suffered at the time of the offense from a severe mental disease or defect?

"[Dr. Clinger]: I saw no indication to the point that he ever suffered from a severe mental disease or defect, you know, ever or during the time of the alleged offense.

"[Prosecutor]: Now, based on your examination and inspection of him, were you able to develop an opinion as to whether he was able to appreciate the nature and quality or the wrongfulness of his acts regarding the time period in question, December 23rd, 24th, and 25th?

"[Dr. Clinger]: I thought that he had no significant impairment as far as mental illness or cognitive deficits or problems in thinking that would have interfered with his ability to appreciate the wrongfulness of his acts and the consequences."

On cross-examination, Brownfield's counsel elicited testimony from Dr. Clinger that Brownfield had informed her that on December 23, 2001, he had ingested several Xanax tablets and had snorted crystal methamphetamine. She testified that he also told her that in the past he had had difficulty recalling events that had happened while he was under the influence of Xanax.

Before the Court of Criminal Appeals, Brownfield argued that the trial court erred in admitting Dr. Clinger's testimony because, he says, the testimony was prohibited by Rule 11.2(b). Specifically, he objected to the admission of Dr. Clinger's testimony regarding statements he had made during the mental examinations. The Court of Criminal Appeals upheld the trial court's evidentiary ruling, holding that Brownfield had opened the door to the issue of his mental state at the time of the offenses by pleading "not guilty by reason of mental disease or defect," by putting on evidence of his mental state at the time of the offenses through the testimony of Dr. Roger Lacy, and by Brownfield's counsel s questioning of other witnesses, attempting to portray Brownfield as unable to recall the events or to speak voluntarily with authorities. However, the fact that Brownfield "opened the door" for the State to present testimony with regard to his mental condition is not determinative of whether the admission of the testimony regarding statements Brownfield made during the pretrial mental examinations was proper.

Rule 11.2(b), Ala. R.Crim. P., governs the admissibility of testimony about statements made by a defendant during a mental examintion. Rule 11.2(b)(2), provides:

> "The results of mental examinations made pursuant to subsection (a)(2) of this rule [providing for examination into the defendant's mental condition at the time of the offense] and the results of similar examinations regarding the defendant's mental condition at the time of the offense conducted pursuant to Rule 11.4 shall be admissible in evidence on the issue of the defendant's mental condition at the time of the offense only if the defendant has not subsequently withdrawn his or her plea of not guilty by reason of mental disease or defect. Whether the examination is conducted with or without the defendant's consent, *no statement made by the defendant during the course of any examination, no testimony by an examining psychiatrist or psychologist based upon such a statement, and no other evidence directly derived from the defendant's statement shall be admitted against the defendant in any criminal proceeding, except on an issue respecting mental condition on which the defendant has testified.*"

(Emphasis added.)

The plain language of Rule 11.2(b)(2) unequivocally forbids the admission of statements made by a defendant or evidence derived from the defendant's statements during a pretrial mental examination unless the defendant testifies about his or her mental condition. Consequently, because Brownfield did not testify at his trial, applying the plain language of Rule 11.2(b)(2), we must conclude that error occurred in the admission of Dr. Clinger's testimony concerning statements Brownfield made during the mental examinations.

Although it was proper to admit into evidence Dr. Clinger's testimony regarding her opinion about Brownfield's mental condition at the time of the offenses, the admission of her testimony regarding statements made by Brownfield during the mental examinations was error.

The inquiry, however, does not end here. This Court must determine whether it "appear[s] that the error complained of has probably injuriously affected [Brownfield's] substantial rights." Rule 45, Ala. R.App. P., provides:

> "No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

The Court of Criminal Appeals has further stated with regard to the application of the harmless-error rule:

> "'"After finding error, an appellate court may still affirm a conviction on the ground that the error was harmless, if indeed it was." *Guthrie v. State*, 616 So.2d 914, 931 (Ala.Crim.App.1993), citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "The harmless error rule applies in capital cases." *Knotts v. State*, 686 So.2d

> 431, 469 (Ala.Crim.App.1995), opinion after remand, 686 So.2d 484 (Ala.Crim.App.1995), aff'd, 686 So.2d 486 (Ala.1996), cert. denied, 520 U.S. 1199, 117 S.Ct. 1559, 137 L.Ed.2d 706 (1997), citing *Ex parte Whisenhant*, 482 So.2d 1241 (Ala.1983). "In order for a constitutional error to be deemed harmless under *Chapman*, the state must prove beyond a reasonable doubt that the error did not contribute to the verdict. In order for the error to be deemed harmless under Rule 45, the state must establish that the error did not injuriously affect the appellant's substantial rights." *Coral v. State*, 628 So.2d 954, 973 (Ala.Crim.App.1992), opinion after remand, 628 So.2d 988 (Ala.Crim.App.1992), aff'd, 628 So.2d 1004 (Ala.1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994). "The purpose of the harmless error rule is to avoid setting aside a conviction or sentence for small errors or defects that have little, if any, likelihood of changing the result of the trial or sentencing." *Davis v. State*, 718 So.2d 1148, 1164 (Ala.Crim.App.1997), aff'd, 718 So.2d 1166 (Ala.1998), cert. denied, 525 U.S. 1179, 119 S.Ct. 1117, 143 L.Ed.2d 112 (1999).'

"*McNabb v. State*, 887 So.2d 929, 976-77 (Ala.Crim.App.2001)."

Sale v. State, 8 So.3d 330, 347 (Ala.Crim.App.2008). See also *Ex parte Brown*, 11 So.3d 933 (Ala.2008) (holding that the alleged improper admission of evidence in a capital trial was harmless); *Cothren v. State*, 705 So.2d 849 (Ala.Crim.App.1997) (holding that the improper admission of the defendant's coerced confession

was harmless in light of the overwhelming evidence establishing that the defendant committed the capital offense).

In this case, a review of the record establishes that the admission of Dr. Clinger's testimony was harmless; the improperly admitted evidence could not have probably injuriously affected Brownfield's substantial rights. The admission of testimony regarding Brownfield's statements concerning his education and work experience is harmless because those statements are not relevant to whether Brownfield committed the offense or to his mental condition at the time of the offense. Consequently, testimony concerning those statements could not have probably injuriously affected Brownfield's substantial rights. Likewise, Dr. Clinger's testimony regarding Brownfield's recollection of the events on December 23, 24, and 25, 2001, could not have probably injuriously affected Brownfield's substantial rights because statements Brownfield made to law-enforcement officers on December 25 and 26, 2001, had been previously admitted into evidence and established with greater detail what Brownfield recalled regarding the events leading up to and following the murders. Brownfield's statement on December 25 provides:

> "This statement is written by Investigator Petty for Mr. Brownfield as told by him. My sister, [Brenda McCutchin], brother-in-law [Latham McCutchin] and myself had been arguing off and on for a while. Brenda was accusing me of taking her money, and she was ripping me off, too. Sunday night, 12/23/01, she, Brenda, went to bed around 10:00 p.m.

Around midnight, I took about seven or eight Xanax; I think it was seven. I was wanting it to knock me out, but it did the opposite. It got me angry the more I thought about how she treated me. I went into a rage. I used a regular claw hammer with a rubber grip, and the grip was black. They slept in the living room–Brenda and Josh slept in the living room, and I went in with the hammer and hit Brenda in the head first, and then I hit Josh. When I hit her, Josh screamed out, and that's why I hit him. I turned out the lights and I left. I locked the door. This was around 2:00 a.m. or 3:00 a.m. From there, I went to Latham's house. I went there because I was going to kill him, too. I got to Latham's, and I knocked on the door and he let me in. I had the hammer inside my jacket. Latham didn't know anything was wrong. I told him I was going to go so he could go back to bed. When I got up, I reached in my coat and pulled out the hammer. Latham was behind me, saw it and grabbed it. I let go with my left hand and elbowed him, and I turned around and punched him several times. That's what happened to my hand. I don't remember how many times I hit him, and I turned around and punched him several times. That's what happened to my hand. I don't remember how many times I hit him, but that's when I started hitting him with the hammer in the head. I was wanting him to die but he kept breathing and making noises. That's when I got the knife. I don't remember which I did first, but I stabbed him in the chest and the

> throat. I took off the clothes I was wearing and took a shower. I had brought the extra clothes from my house that I put back on. I took his wallet with, I think, about fifty dollars in it. I left and went to the South Pittsburgh/Kimball area. I pulled into a restaurant; I think it was Jack's. It was on the right side of the road. I pulled into the dumpster and threw away the coat, hammer, knife, my clothes and Latham's wallet. I rode around for a while, and then I went to Wal-Mart which is where I bought this shirt and other clothes and gifts. I bought them with the money out of Latham's wallet. All of this happened between midnight to 5:00 p.m. on Monday. I had my own fifty-dollar gift certificate from Wal-Mart, which I also used. I didn't start my day planning to kill anyone. That's not me. I guess I got to a breaking point."

Brownfield made a similar, though not identical statement, to law-enforcement officers on December 26. Brownfield's statement establishes in detail his recollection of the events surrounding the murders; the statements made to Dr. Clinger some seven months after the murders are general and cursory. Therefore, Dr. Clinger's testimony with regard to statements made by Brownfield about his activities on the days surrounding the murders, in light of the previously admitted detailed statement Brownfield made to the police, could not have probably injuriously affected Brownfield's substantial rights.

Finally, the evidence of Brownfield's guilt as to the capital offenses was overwhelming. The evidence indicated that during the week of

December 24, 2001, Brownfield had been using crystal methamphetamine and on the evening of December 24 had consumed several Xanax tablets. After taking the tablets, he became angry at his sister, Brenda McCutchin, who was sleeping in her bed with her grandson, Joshua Hodges. Brownfield entered the room and beat both Brenda and Joshua with a claw hammer. He then left Brenda's house and traveled in her car to Latham McCutchin's house. He entered Latham's house, and a struggle ensued. Brownfield struck Latham with his fists and the hammer. Brownfield also stabbed Latham in the heart and cut his throat with a knife. When Brownfield left Latham's house, he took Latham's wallet. The evidence further indicated that Brownfield admitted to his ex-girlfriend, Tammy Farmer, that he had killed Brenda, Joshua, and Latham. The results of DNA testing of blood found on Brownfield's shoes indicated that the blood was Latham's. Because the evidence was sufficient to prove beyond a reasonable doubt that Brownfield committed the capital offenses, the error in the admission of Dr. Clinger's testimony was harmless.

The judgment of the Court of Criminal Appeals is affirmed.

AFFIRMED.

COBB, C.J., and LYONS, WOODALL, SMITH, BOLIN, PARKER, and MURDOCK, JJ., concur.

SHAW, J., recuses himself.*

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* Justice Shaw was a member of the Court of Criminal Appeals when that court considered this case.

COURT OF CRIMINAL APPEALS OF ALABAMA

CR-04-0743

April 27, 2007

JAMES BEN BROWNFIELD, JR.,

—v.—

STATE OF ALABAMA.

STEPHEN P. BUSSMAN, Fort Payne; and L. JAYSON CARROLL, Rainsville, *for appellant.*

TROY KING, Atty. Gen., and TRACY DANIEL, Asst. Atty. Gen., *for appellee.*

MCMILLAN, *Judge.*

The appellant, James Ben Brownfield, Jr., was convicted of three counts of capital murder for killing Brenda McCutchin, Joshua Hodges, and Latham McCutchin. Count I charged Brownfield

with murdering Latham McCutchin during the course of a burglary. See §13A-5-40(a)(4), Ala.Code 1975. Count II charged Brownfield with murdering Brenda McCutchin, Joshua Hodges, and Latham McCutchin during one act or pursuant to one scheme or course of conduct. See §13A-5-40 (a)(10), Ala.Code 1975. Count III charged Brownfield with murdering Joshua Hodges who was under 14 years of age. See §13A-5-40 (a)(15), Ala.Code 1975. The jury recommended by a vote of 11-1 that Brownfield be sentenced to death. The trial court accepted the jury's recommendation and sentenced Brownfield to death. This appeal followed.

The trial court set out the following statement of the evidence, which we adopt:

> "At some time in the late evening hours of December 23, 2001, or the early morning hours of December 24, 2001, Brenda Whitehead McCutchin, Joshua Dewayne Hodges, and Latham Durwood McCutchin were murdered in their homes in Scottsboro, Alabama. At the time of their deaths, Brenda was forty-seven years old, Joshua was three years old, and Latham was sixty-four years old.
>
> "After consuming Xanax pills on the night of December 23, 2001, the twenty-seven year old defendant, James Ben Brownfield, Jr., became enraged with his sister, Brenda Whitehead McCutchin, over drugs and money. While Brenda and her grandson, Joshua Dewayne Hodges, were sleeping in their bed, the defendant decided to kill his sister and her estranged husband, Latham Durwood

McCutchin. The defendant took a claw hammer into the room where Brenda and Joshua were sleeping and hit Brenda with it. When the defendant hit Brenda, Joshua awoke crying. At that time, the defendant began hitting both Brenda and Joshua with the claw hammer. Brenda suffered approximately twenty forceful blows to the head and other injuries to her body. Joshua suffered approximately sixteen blows to the head and other injuries to his body. Both Brenda and Joshua died from multiple blunt-force injuries. Before he left Brenda's house, the defendant attempted to burn the house with kerosene and a cigarette.

"After killing Brenda and Joshua, the defendant took the claw hammer and a set of clean clothes and drove across town to the residence of his brother-in-law, Latham Durwood McCutchin. The defendant initially pretended a friendly visit with Latham but later inside the residence, the defendant informed Latham that he was going to kill him. The defendant and Latham struggled for the claw hammer with the defendant subduing Latham by hitting him with his fists and the hammer. Latham suffered numerous injuries. He suffered at least ten forceful blows to the head with the claw hammer, bruising to the lower chest, arms, and hands, fractured ribs and a fractured vertebra. Later, the defendant stabbed Latham in the heart and cut his throat with a knife. Latham died from multiple blunt-force injuries. After killing Latham, the defendant showered and dressed in the clean clothes. He gathered the soiled clothes,

claw hammer, and knife and placed them in a garbage bag that he found at Latham's house.

"The defendant left Latham's house and went to a Christmas party where he saw friends and acquaintances. He told his friend, Nick Logan, that he was moving to Tennessee because he and Brenda had argued and she had kicked him out of the house. Later, the defendant left the party and drove toward Tennessee to Stevenson, Alabama. He placed the garbage bag of evidence in a dumpster in Stevenson and drove back to Scottsboro. The defendant had contact with friends throughout the day of December 24, 2001. The night of December 24, 2001, the defendant went to Tammy Farmer's apartment. During conversations with Tammy, his girlfriend, the defendant confessed to the murders of Brenda, Joshua, and Latham.

"Concerned about his father, Rodney McCutchin traveled to Latham McCutchin's house. Rodney and his son found the body of Latham and called 911. The Scottsboro Police Department immediately began an investigation into the death of Latham. During the investigation, they obtained information that implicated Brenda McCutchin and her brother, the defendant, James Ben Brownfield, Jr. On the morning of December 25, 2001, the Scottsboro Police Department obtained a search warrant to search the home of Brenda McCutchin. Upon searching the home, the police discovered the bodies of Brenda and her grandson, Joshua. The

> Scottsboro Police Department intensified their search for Brenda's car and the defendant.
>
> "At approximately 10:00 A.M. on December 25, 2001, the Scottsboro Police Department located Brenda's car and the defendant at the apartment of defendant's girlfriend, Tammy Farmer. The defendant was apprehended and transported to the Scottsboro Police Department. On December 25 and 26, 2001, the defendant gave Investigators Robert Petty and Doug Hood of the Scottsboro Police Department a statement of confession to the murders."

(C. 345-347.) The trial court also noted that the evidence indicated that Brownfield wrote messages on the walls of both residences: At Latham's house Brownfield wrote "This was necessary Ben. I'm sorry for your family. They deserved it." (C. 351);[1] and at Brenda's residence those messages were throughout the house and included comments such as " 'Fuck this God,' 'Fuck this world,' 'I'll be dead too,' 'It's about to pick up,' 'Don't look for me,' 'Tammy I love you Always Never 4-get Baby,' 'Killing is my business,' and 'My whole life I have been ran over. It's stopping now.' " (C. 353.)

The evidence further indicated that although Brenda McCutchin and Latham McCutchin were married, they were separated and no longer lived together, and that Brownfield lived with Brenda

[1] Although the trial transcript contains punctuation marks such as periods, the exhibits indicate that this writing on the wall contained only a period at the end of the comment.

and Joshua at Brenda's house on Wallace Lane in Scottsboro. The evidence also indicated that the victims did not die immediately upon the striking of the first blows; rather, they survived for some period before succumbing to their injuries. Further, each of the victims had what were characterized as defensive wounds, indicating that they attempted to ward off at least some of the blows from the hammer. Finally, Brownfield presented evidence indicating that he had consumed seven or eight Xanax pills on the night of the murders and that he had also used crystal methamphetamine a number of times in the week preceding the murders.

The jury convicted Brownfield of three counts of capital murder. A separate sentencing hearing was held, at which the State relied on the following aggravating circumstances to support a death sentence: that Latham was killed during a burglary; that the murders of two or more people were committed by one act or pursuant to one scheme or course of conduct; and that the murders were especially heinous, atrocious, or cruel when compared to other capital offenses. After the sentencing hearing, the jury, by a vote of 11 to 1, recommended that Brownfield be sentenced to death. The circuit court held a separate sentencing hearing pursuant to §13A-5-47(c), Ala.Code 1975, and sentenced Brownfield to death. This appeal, which is automatic when a defendant has been sentenced to death, followed. See §13A-5-53(a), Ala.Code 1975.

Standard of Review

Because Brownfield has been sentenced to death, this Court must review these proceedings for plain error. Rule 45A, Ala.R.App.P., states:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

When discussing the application of the plain-error standard of review, this Court has stated:

> "The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies only if the error is 'particularly egregious' and if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' See *Ex parte Price*, 725 So.2d 1063 (Ala.1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); *Burgess v. State*, 723 So.2d 742 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); *Johnson v. State*, 620 So.2d 679, 701

(Ala.Cr.App.1992), rev'd on other grounds, 620 So.2d 709 (Ala.1993), on remand, 620 So.2d 714 (Ala.Cr.App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993)."

Hall v. State, 820 So.2d 113, 121-22 (Ala.Crim.App.1999), aff'd, 820 So.2d 152 (Ala.2001). Although the failure to object will not preclude our review, it will weigh against any claim of prejudice. See *Dill v. State*, 600 So.2d 343 (Ala.Crim.App.1991), aff'd, 600 So.2d 372 (Ala.1992).

I.

Brownfield contends that he is entitled to a new trial based on a number of alleged evidentiary errors.

A.

Brownfield argues that the trial court erred in admitting his confessions into evidence because, he claims, the confessions were involuntarily given without a knowing waiver of his *Miranda*[2] rights.[3] Specifically, Brownfield contends that he lacked the capacity to knowingly and voluntarily waive his rights because he had ingested seven or eight Xanax pills before the commission of the murders and had been using methamphetamine for two weeks before the murders.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[3] Brownfield raised this claim in a supplemental brief filed with this Court before the State filed its brief. The State addressed this claim in its brief.

The trial court conducted a suppression hearing at which a number of witnesses testified. Hannah Robertson testified that she and Brownfield were friends. According to Robertson, she saw Brownfield at Melinda Davidson's house late in the evening on December 23 or early in the morning on December 24, and Brownfield told her that he had done some bad things, that he was leaving town to go to Tennessee, and that he wanted to straighten up. She stated that she took his comments to be telling her good-bye. Robertson further testified that she saw Brownfield on the evening of December 24, and that he told her at that time that he was not leaving town.

Officer Derrick Porch of the Scottsboro Police Department testified that Brownfield was located in an apartment on Sarah Betty Lane on December 25, 2001, and that he was taken into custody at that time. He stated that there were two or three officers telling Brownfield to come out of the apartment with his hands up. According to Officer Porch, Brownfield complied with the officers' orders and came out of the apartment with his hands in the air; he lay down on his stomach, placed his hands behind his back, and was handcuffed. Officer Porch testified that Brownfield was not struck or beaten by officers when he was taken into custody, nor was he threatened by any officers in Officer Porch's presence. Officer Porch stated that approximately 15 minutes after Brownfield left the apartment and was placed in handcuffs, he transported Brownfield to the police station, which he testified was approximately a mile and a half from the apartment. Officer Porch testified that when they arrived at the station, he

took Brownfield to the break area of the station and had him sit at a table. Officer Porch stated that he did not engage in any conversation with Brownfield at that time. He stated that approximately 20 minutes later, Investigator Doug Hood with the Jackson County District Attorney's office and Investigator Robert Petty of the Scottsboro Police Department came and took custody of Brownfield. According to Officer Porch, Brownfield did not appear to be intoxicated; he did not have any trouble walking into the police station from the patrol car or sitting at the table in the breakroom; and he did not get physically ill while in Officer Porch's presence. Officer Porch stated that he saw nothing that led him to believe that Brownfield was intoxicated.

Officer Porch testified that around 3:30 p.m. on December 26, 2001, he escorted Brownfield from the jail to his patrol car, transported him back to the police department, and released him to Investigators Hood and Petty; he stated that he did not engage in any conversation with Brownfield at that time. He further testified that at approximately 5:00 p.m. on December 26, he transported Brownfield back to the jail without conversation. Officer Porch testified that at no time while he was observing Brownfield did he or anyone in his presence use violence, make any promises or threats, or offer him any inducement to get Brownfield to make a statement.

Investigator Hood testified that Investigator Petty and he took custody of Brownfield at approximately 12:50 p.m. on December 25 to interview him and that he conducted a second interview with Brownfield at 3:28 p.m. on December 26,

2001. Investigator Hood stated that at the onset of both interviews he advised Brownfield of his *Miranda* rights by reading him those rights from a card, and that Brownfield checked the box on the *Miranda* card indicating that he understood his rights and that he wished to speak to authorities. He signed the card, and Investigator Hood and Investigator Petty also signed the card as witnesses.[4] According to Investigator Hood, Brownfield was cooperative and listened to authorities and followed directions. Investigator Hood further stated that neither he nor anyone in his presence used any violence on Brownfield, made any promises or threats to Brownfield, told him that it would be better for him to confess or to make a statement, or offered him any inducement to get him to make a statement. He testified that Brownfield was handcuffed at the beginning of the December 25 interview, but that he removed Brownfield's handcuffs after observing his demeanor during the initial part of the interview and determining that Brownfield was being cooperative and did not pose a risk.

Investigator Petty also testified that he was present when Investigator Hood interviewed Brownfield on December 25 and 26. Investigator Petty's testimony was substantially similar to Investigator Hood's testimony, i.e., that Brownfield did not appear to be intoxicated when he was being interviewed, that neither he nor anyone in his

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[4] Investigator Hood stated that, although he read the Miranda rights to Brownfield at the beginning of the interview and Brownfield indicated that he understood and wished to speak with them, Brownfield did not actually sign the card until the interview was concluded.

presence used any violence on Brownfield, made any promises or threats to Brownfield, told Brownfield that it would be better for him to confess or to make a statement, or offered Brownfield any inducement to get him to make a statement; he also testified that Brownfield appeared to understand his rights and that he voluntarily waived them to speak with authorities. Investigator Petty further testified that Brownfield's eyes were not bloodshot, that he did not detect any slurred speech, and that Brownfield was quiet during portions of the interview but not hard to understand.

Investigator Petty also testified that he transported Brownfield back to the jail following the first interview, and that Brownfield agreed to take officers to the location in Tennessee where he had discarded the bag containing the bloody clothing, the hammer, the knife, and Latham's wallet. According to Investigator Petty, they went to a restaurant where Brownfield claimed to have discarded the items, but were unable to locate any evidence.

Although Brownfield did not present any witnesses at the suppression hearing, he did file a number of ex parte motions with the trial court regarding his expert witnesses and the manner in which the defense contended Xanax and other medications affect an individual's mental state.[5]

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[5] There was an extended discussion regarding the absence of the defense experts at the suppression hearing. The record indicates that the suppression hearing had been continued a number of times; the State's evidence had been presented and then the hearing continued for two weeks to allow the defense to prepare and call its witnesses. Brown-

"'The trial court held the suppression hearing outside the hearing of the jury; therefore, we review the evidentiary findings of the trial court at that hearing under the *ore tenus* standard.' *Ex parte Jackson*, 886 So.2d 155, 159 (Ala.2004). 'When evidence is presented *ore tenus* to the trial court, the court's findings of fact based on that evidence are presumed to be correct,' *Ex parte Perkins*, 646 So.2d 46, 47 (Ala.1994); '[w]e indulge a presumption that the trial court properly ruled on the weight and probative force of the evidence,' *Bradley v. State*, 494 So.2d 750, 761 (Ala.Crim.App.1985), *aff'd*, 494 So.2d 772 (Ala.1986); and we make '"all the reasonable inferences and credibility choices supportive of the decision of the trial court."' *Kennedy v. State*, 640 So.2d 22, 26 (Ala.Crim.App.1993), quoting *Bradley*, 494 So.2d at 761. '"'Where evidence is presented to the trial court *ore tenus* in a nonjury case, a presumption of correctness exists as to the court's conclusions on issues of fact; its determination will not be disturbed unless clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence.'"' *Ex parte Jackson*, 886 So.2d at 159, quoting *State v. Hill*, 690 So.2d 1201, 1203 (Ala.1996), quoting in turn *Ex parte Agee*, 669 So.2d 102, 104 (Ala.1995).

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field did not raise on appeal the trial court's denial of his motion for an additional continuance so that he could secure the presence of his expert witnesses at the suppression hearing; we find no plain error in the trial court's refusal to grant another con-tinuance approximately one week before trial.

> "However, '[t]he *ore tenus* presumption of correctness applies to findings of fact, not to conclusions of law.' *City of Russellville Zoning Bd. of Adjustment v. Vernon*, 842 So.2d 627, 629 (Ala.2002). '[T]he ore tenus rule does not extend to cloak a trial judge's conclusions of law, or incorrect application of law to the facts, with a presumption of correctness.' *Eubanks v. Hale*, 752 So.2d 1113, 1144-45 (Ala.1999). ' " '[W]hen the trial court improperly applies the law to the facts, no presumption of correctness exists as to the court's judgment.' " ' *Ex parte Jackson*, 886 So.2d at 159, quoting *Hill*, 690 So.2d at 1203, quoting in turn, *Ex parte Agee*, 669 So.2d at 104. Thus, we review the trial court's conclusions of law and its application of law to the facts under the de novo standard of review."

Washington v. State, 922 So.2d 145, 157-58 (Ala.Crim.App.2005).

> "When reviewing a ruling on the voluntariness of a confession, we apply the standard articulated by the Alabama Supreme Court in *McLeod v. State*, 718 So.2d 727 (Ala.1998):
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> " 'For a confession, or an inculpatory statement, to be admissible, the State must prove by a preponderance of the evidence that it was voluntary. *Ex parte Singleton*, 465 So.2d 443, 445 (Ala.1985). The initial determination is made by the trial court. *Singleton*, 465 So.2d at 445. The trial court's determination will not be disturbed unless it is contrary to the great weight of the evidence or is manifestly wrong.

Marschke v. State, 450 So.2d 177 (Ala.Crim.App.1984). . . .

"'The Fifth Amendment to the Constitution of the United States provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." Similarly, §6 of the Alabama Constitution of 1901 provides that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." These constitutional guarantees ensure that no involuntary confession, or other inculpatory statement, is admissible to convict the accused of a criminal offense. *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961); *Hubbard v. State*, 283 Ala. 183, 215 So.2d 261 (1968).

"'It has long been held that a confession, or any inculpatory statement, is involuntary if it is either coerced through force or induced through an express or implied promise of leniency. *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). In *Culombe*, 367 U.S. at 602, 81 S.Ct. at 1879, the Supreme Court of the United States explained that for a confession to be voluntary, the defendant must have the capacity to exercise his own free will in choosing to confess. If his capacity has been impaired, that is, "if his *will has been overborne*" by coercion or inducement, then the confession is involuntary and cannot be admitted into evidence. *Id.* (emphasis added).

> "'The Supreme Court has stated that when a court is determining whether a confession was given voluntarily it must consider the "totality of the circumstances." *Boulden v. Holman*, 394 U.S. 478, 480, 89 S.Ct. 1138, 1139-40, 22 L.Ed.2d 433 (1969); *Greenwald v. Wisconsin*, 390 U.S. 519, 521, 88 S.Ct. 1152, 1154, 20 L.Ed.2d 77 (1968); see *Beecher v. Alabama*, 389 U.S. 35, 38, 88 S.Ct. 189, 191, 19 L.Ed.2d 35 (1967). Alabama courts have also held that a court must consider the totality of the circumstances to determine if the defendant's will was overborne by coercion or inducement. See *Ex parte Matthews*, 601 So.2d 52, 54 (Ala.) (stating that a court must analyze a confession by looking at the totality of the circumstances), cert. denied, 505 U.S. 1206, 112 S.Ct. 2996, 120 L.Ed.2d 872 (1992); *Jackson v. State*, 562 So.2d 1373, 1380 (Ala.Crim.App.1990) (stating that, to admit a confession, a court must determine that the defendant's will was not *overborne* by pressures and circumstances swirling around him); *Eakes v. State*, 387 So.2d 855, 859 (Ala.Crim.App.1978) (stating that the true test to be employed is "whether the defendant's will was *overborne* at the time he confessed") (emphasis added).'

"718 So.2d at 729 (footnote omitted)."*Robitaille v. State*, 971 So.2d 43, 55-56 (Ala.Crim.App.2005).

Additionally, we note that "intoxication" has been defined by the Alabama Legislature to include "a disturbance of mental or physical capacities resulting from the introduction of any substance into the body." §13A-3-2(e)(1), Ala.Code

1975. As this Court stated in *Hubbard v. State*, 500 So.2d 1204, 1218 (Ala.Crim.App.):

> "In order for intoxication to render a confession inadmissible, it must be shown that the mind of the defendant was substantially impaired when the confession was made. *Moore v. State*, 488 So.2d 27 (Ala.Cr.App.1986); *Moore v. State*, 415 So.2d 1210 (Ala.Cr.App.), cert. denied, 415 So.2d 1210 (Ala.), cert. denied, 459 U.S. 1041, 103 S.Ct. 459, 74 L.Ed.2d 610 (1982), and cases cited therein. 'Intoxication, short of mania or such impairment of the will and mind as to make an individual unconscious of the meaning of his words, will not render a statement or confession inadmissible.' *Tice v. State*, 386 So.2d 1180, 1185 (Ala.Cr.App.), cert. denied, 386 So.2d 1187 (Ala.1980). See also *Palmer v. State*, 401 So.2d 266, 268 (Ala.Cr.App.), cert. denied, 401 So.2d 270 (Ala.1981), cert. denied, 455 U.S. 922, 102 S.Ct. 1280, 71 L.Ed.2d 463 (1982).
>
> "The voluntariness of an alleged confession is a question of law addressed to the trial court, whose ruling will not be disturbed on appeal unless it appears to be contrary to the great weight of the evidence or is manifestly wrong. *Tice v. State*, supra; *Garrison v. State*, 372 So.2d 55 (Ala.Cr.App.1979). The degree of intoxication which would affect the voluntariness of a statement is a question of fact initially addressed to the trial court and, depending upon its ruling, then to the jury for its consideration. *Tice v. State*, 386 So.2d at 1185."

Here, the trial court was presented with conflicting evidence, and resolved the credibility choices adversely to Brownfield. In its order denying Brownfield's motion to suppress the confessions and the evidence seized at the time of Brownfield's arrest, the trial court set out the following statement of the facts:

> "The defendant moves to suppress statements made by the defendant to investigators after his arrest. The defendant was taken into custody by Officer Derrick Porch of the Scottsboro Police Department on December 25, 2001, at 12:00 P.M. Officer Porch transported the defendant to the Scottsboro Police Department. He testified that he remained in the break room with the defendant until Detectives Doug Hood and Bob Petty took custody of the defendant. Officer Porch testified that at no time was the defendant beaten, threatened, or offered promises. Officer Porch testified that the defendant never said anything to him. Officer Porch stated that the defendant did not appear to be intoxicated, that he was never physically sick, that he had no trouble walking, that he wasn't jittery, and that he followed instructions and responded appropriately. Detective Hood testified that he took custody of the defendant at approximately 12:45 P.M. for the purpose of interviewing the defendant. He testified that the defendant did not appear to be intoxicated. He stated that the first thing he did was advise the defendant of his *Miranda* rights. Detective Hood read the *Miranda* rights to the defendant from a *Miranda* card at 12:52 P.M. Immediately

after Detective Hood read the rights from the *Miranda* card, the defendant told the detective that he understood his rights and agreed to talk to the detectives. The defendant gave a statement to the detectives that Detective Petty reduced to writing. The defendant signed the written statement and *Miranda* card after the interview. The defendant's statement of December 25, 2001, is partially recorded by videotape. The beginning of the interview is not recorded by videotape because the detectives did not have access to the equipment. Detective Hood made the decision to proceed with the interview without the video recording because of his legitimate concern that there could be other undiscovered victims and that time was of the essence. Detective Hood testified that at no time was the defendant threatened, physically harmed, or given promises or inducements of any kind. Detective Petty testified that he, Detective Hood, and the defendant were present for the interview. He stated that neither he nor Detective Hood applied any violence, threatened, or offered any promise or inducement to the defendant. After the interview at the Scottsboro Police Department, the defendant agreed to go to Stevenson with Detective Petty to identify the place he had described in his statement. Major Ralph Dawe questioned the defendant regarding the place when they arrived in Stevenson. This questioning took place approximately forty-five minutes after the defendant had received his *Miranda* rights and had waived them. Detective Petty testi-

fied that he was present during the questioning and that no one applied any violence, threatened, or offered any promise or inducement to the defendant.

"The defendant gave another statement to the police on December 26, 2001. The entire statement was recorded by videotape. Detectives Hood and Petty conducted the interview. Prior to the statement, the defendant was read his *Miranda* rights and waived them. At no time did Detective Hood or Detective Petty physically harm, threaten, or offer any promise or inducement to the defendant.

"The court is mindful that, due to the right against self-incrimination, an involuntarily given incriminating statement is not admissible in a subsequent criminal prosecution. The court finds from the evidence that the defendant's statements to Detectives Hood and Petty and Major Ralph Dawe were made freely and voluntarily. The court further finds based on the totality of the circumstances that the defendant knowingly and voluntarily waived his Miranda rights."

(C. 175-177.) Similarly, the trial court found as follows in its sentencing order:

"The court has fully considered the testimony of Dr. Roger Lacy, Dr. Lee Evans, Dr. Melissa Clinger, and all other witnesses during the guilt and penalty phases of the trial. The defendant maintains that he was under the influence of extreme mental or emotional disturbance due to his use of crystal methamphetamine and Xanax. In his confession to law

enforcement, the defendant indicated that he had taken seven or eight Xanax pills prior to the three murders. The defendant did not reveal to law enforcement that he had been using crystal methamphetamine each day of the week prior to the murders. The first evidence of defendant's use of crystal methamphetamine was reported by Dr. Melissa Clinger in her Forensic Evaluation Report. The information was provided to Dr. Clinger by the defendant during the evaluation process. Later, the defendant reported to Dr. Lacy and Dr. Evans that he had been on a crystal-methamphetamine binge the week prior to the murders. He also reported to the experts that he had taken Xanax the night of the murders. The defendant's friends testified that the defendant was a frequent user of crystal methamphetamine. The court does not doubt that the defendant was using crystal methamphetamine the week prior to the crimes and Xanax the night of the crimes. The court, however, has no credible evidence regarding the quantity of drugs ingested by the defendant or the times of ingestion. Furthermore, the evidence indicates that over time people develop immunities and tolerance to the effects of drugs. The defendant had been abusing drugs for years. The court finds by a preponderance of the evidence that the defendant did not commit the murders while under the influence of extreme mental or emotional disturbance. The defendant's demeanor and actions immediately following the crimes indicate otherwise. The defendant's friends

and acquaintances testified that the defendant acted normally shortly after the murders. Teresa Manning testified that she saw the defendant at the store where she worked, on December 24, 2001, at 1:00 A.M. or 1:30 A.M. She said that she and the defendant carried on a conversation and that there was nothing unusual about how the defendant was acting. The defendant attended a party immediately after the murders. Hannah Robertson testified that she saw the defendant at the party between 1:00 A.M. and 2:00 A.M. on December 24, 2001. She said the defendant looked better than usual. She said that the defendant's hair looked wet. She carried on a conversation with the defendant and said that he seemed normal, that he could talk very good, and did not appear to be intoxicated. Nick Logan, the defendant's best friend, testified that he saw the defendant at the party on December 24, 2001. In fact, he and the defendant left the party and rode around for approximately twenty minutes. Mr. Logan talked with the defendant for a long period of time shortly after the murders and he said that the defendant did not appear to be intoxicated. He said he noticed nothing out of the ordinary. The court does not find that the defendant was so impaired that he was suffering from an extreme mental or emotional disturbance at the time of the offenses."

(C. 355-357.)

The evidence indicated that Brownfield committed the murders sometime during the evening of December 23, 2001, or the early morning hours

of December 24, 2001. The evidence further indicated that in the early morning hours of December 24, 2001, Brownfield went to a party and engaged in what witnesses testified can best be described as normal, coherent conversation. Upon his arrest around noon on December 25, 2001, Brownfield confessed to the murders. He also confessed in a second interview with authorities on the afternoon of December 26, 2001. A number of law-enforcement officials testified that when he made his confessions Brownfield appeared to be coherent, did not appear to be intoxicated or under the influence of any substance, and appeared to understand his rights and voluntarily waived them without threat, promise, or inducement. It is clear that the trial court determined that Brownfield was not so affected by his purported ingestion of Xanax on the night of the murders and crystal methamphetamine in the weeks leading up to the murders that he was unable to knowingly and voluntarily waive his *Miranda* rights. We have reviewed the transcript, the videotapes of the two recorded confessions, and the other evidence in the record relevant to this issue, and we conclude that the record supports the trial court's findings. The trial court did not abuse its discretion in denying Brownfield's motion to suppress his confessions on this ground.[6]

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[6] We note that although Brownfield's expert witnesses did not testify at the suppression hearing, they did testify at trial to the effect that Brownfield was unable to knowingly or voluntarily waive his Miranda rights or consent to the search of the automobile because of his ingestion of Xanax and crystal methamphetamine. Although not specifically noted in the trial court's order denying Brownfield's motion

B.

Brownfield also claims that the trial court erred in denying his motion to suppress photographs of items seized from his automobile because, he claims, his consent to the search of the vehicle was involuntary.[7] The photographs showed bags from a Wal-Mart discount store containing clothing Brownfield purchased after the murders. In a scattergun manner, Brownfield avers that he consented to the search only upon an overwhelming show of force by the police, because of his alleged compromised mental state caused by his drug use, and because he was not first advised of his *Miranda* rights before consenting to the search.

At the suppression hearing, Captain Ralph Dawe of the Scottsboro Police Department testified that Brownfield consented to a search of the vehicle after he was arrested. According to Captain Dawe, the automobile was searched for weapons or bloody clothing, and officers discovered, among other things, deodorant, a hair trimmer, and several articles of clothing.

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to suppress the evidence, the trial court obviously resolved any credibility choices re-garding Brownfield's mental state in favor of the State, as is evidenced by the trial court's findings in its sentencing order concerning mitigating evidence of Brownfield's alleged ingestion of drugs.

[7] The State acknowledges that, although Brownfield's sister Brenda, and not Brownfield, was the owner of the automobile, Brownfield's lack of standing to challenge the search of the vehicle was not raised at trial and has therefore been waived. Thus, for purposes of this opinion, we assume that Brownfield had standing to challenge the search of the vehicle. See, e.g., Washington, 922 So.2d at 163.

Further, as is discussed in Part I.A. above, Officer Porch testified that two or three officers ordered Brownfield to come out of the apartment with his hands up; that Brownfield complied with the officers' orders and came out of the apartment with his hands in the air, lay down on his stomach, and placed his hands behind his back, and was placed in handcuffs at that time. The undisputed testimony indicated that Brownfield was not struck or beaten by officers when he was taken into custody, nor was he threatened by any officers in Officer Porch's presence.

With regard to Brownfield's alleged intoxication rendering his consent involuntary, as we have already discussed in Part I.A. above, the trial court found from the conflicting evidence that Brownfield was not intoxicated at the time of the murders, at the time of his arrest, or at the time he made his statements to the authorities. For the same reasons stated in Part I.A., Brownfield is not entitled to any relief on this claim.

Similarly, Brownfield is not entitled to any relief based on his contentions that the search of the vehicle was conducted before he was advised of his *Miranda* rights and that he consented to the search only in the face of overwhelming force from the police. As this Court recently stated in *Washington*, supra:

> "'This court has long held that warrantless searches are *per se* unreasonable, unless they fall within one of the recognized exceptions to the warrant requirement.' *Rokitski v. State*, 715 So.2d 859, 861 (Ala.Crim.App.1997). 'One of the exceptions to the rule that a warrantless search is *per se* unreasonable is a search

conducted with the consent of the owner.' *Foldi v. State*, 861 So.2d 414, 422 (Ala.Crim.App.2002). 'Consent to a search must be knowingly, intelligently, and freely given.' *Ex parte Wilson*, 571 So.2d 1251, 1255 (Ala.1990). ' "[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." ' *Miller v. State*, 602 So.2d 488, 491 (Ala.Crim.App.1992), quoting *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). '[T]he question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.' *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). 'Factors relevant to this determination include the circumstances under which the defendant came into custody, the defendant's awareness of the right to withhold consent, the defendant's performance of cooperative acts, the defendant's age, intelligence, and education, and the nature of police behavior.' *Cable v. State*, 540 So.2d 769, 774 (Ala.Crim.App.1985).

"'No particular factor should be given undue weight in determining the issue of voluntariness. The fact that a defendant was not informed of the right to refuse to consent does not, of itself, negate a finding of voluntariness. Nor does the fact that the defendant was

in police custody or that the officers made a showing of force. *Kennedy v. State*, 640 So.2d 22, 24-5 (Ala.Cr.App.1993), quoting *Martinez v. State*, 624 So.2d 711, 715-16 (Ala.Cr.App.1993).'

"*Rokitski*, 715 So.2d at 861-62. See also *United States v. Watson*, 423 U.S. 411, 424, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) ('[T]he fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. Similarly, under *Schneckloth [v. Bustamonte*, 412 U.S. 218, 234 (1973)], the absence of proof that [a defendant] knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance.'). 'However, although not dispositive of the question of voluntariness, the fact that a defendant had been advised of his *Miranda* rights and of his right to refuse the request to search are significant factors in determining whether the consent was voluntary.' *Foldi*, 861 So.2d at 422. See also *United States v. Mendenhall*, 446 U.S. 544, 558-59, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) ('Although the Constitution does not require "proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search," [*Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973)] (footnote omitted), such knowledge was highly relevant to the determination that there had been consent.')."

Washington v. State, 922 So.2d at 163-64.

Here, Brownfield, who was 27 years old at the time of his arrest, was ordered out of the apart-

ment by a number of armed officers and was instructed to lay down in the ground, at which time he was handcuffed. Officers then requested his permission to search the vehicle. However, under the specific facts of this case, it appears that the consent was knowingly and freely given. As has been thoroughly discussed, there is no indication that Brownfield was under the influence of alcohol or any narcotic substance at the time he consented to the search, despite his claims that he took a number of Xanax a day and a half before the search and that he had been using crystal methamphetamine for two weeks before the search. The overwhelming evidence, specifically the abundance of testimony from law enforcement and Brownfield's friends alike, indicated that he was not under the influence at the time of his arrest and subsequent consent to the search of the vehicle. Further, he was cooperative with authorities from the instant he encountered them at the apartment. Finally, there is no indication that Brownfield was unaware of or incapable of refusing to consent to the search. Rather, considering the totality of the circumstances and resolving all credibility choices in favor of the trial court's ruling, we conclude that after being lawfully arrested Brownfield voluntarily consented to the search, even without first being advised of his *Miranda* rights, and that that consent was freely offered without regard to the show of force by the police in taking Brownfield into custody.

Moreover, consent is not the lone exception to the warrant requirement. Rather, there are a number of additional exceptions, including (1) a search incident to a lawful arrest and (2) probable

cause. See *State v. Gargus*, 855 So.2d 587 (Ala.Crim.App.2003). Both exceptions apply in this case. For these reasons, we cannot say that the trial court erred in denying Brownfield's motion to suppress the photographs of the items discovered in the automobile.

C.

Brownfield next contends that the trial court allowed improper hearsay testimony. Specifically, he claims that Virginia Goode was allowed to testify that "her brother [Charles Jackson] had called her at approximately noon on December 25, 2001, and told her that Tammy Farmer had said that there were two bodies in a home on Wallace Lane and that 'this guy' had killed them. (R. 1122.)" (Brownfield's brief at p. 40.)

Prior to Goode's testimony, Tammy Farmer testified that she and Brownfield dated "off and on" (R. 1085) and that she also dated Charles Jackson. (R. 1087.) According to Farmer, Brownfield admitted to her sometime late in the evening of December 24 or early in the morning of December 25 that he had killed Brenda, Josh, and his brother-in-law, and described the killings in some detail. Farmer testified that Brownfield finally went to sleep at approximately 4:00 a.m. on December 25, 2001, at which time she also went to sleep. She further testified that at approximately 11:15 a.m. on December 25, 2001, she telephoned Jackson and "proceeded to tell him what had happened." (R. 1108.) Farmer stated that the police arrived at her apartment shortly after she spoke with Jackson.

Also before Goode's testimony, Larry Duncan, director of the Jackson County 911 emergency line, testified that someone placed an emergency 911 call at approximately noon on December 25, 2001, and reported two bodies in a house. According to Duncan, there was no audiotape of the 911 call, but the notion on the dispatcher's log indicated as follows:

> "On 12/25/2001, at 11:48, operator 720 received a call on the Scottsboro Police Department line. And he entered it as a 1095, which is record, because he didn't know what to do with it at that time. And it was a call by an unknown female who refused to identify herself, and she advised that she had knowledge of a female and child dead at a residence on Wallace Lane and would not say how she knew. And, once again, she refused her name, and advised the location as the second residence on the left."

(R. 1115.) Duncan identified additional notations on the log as indicating that law enforcement was notified of the call and reflecting the 911-dispatch operator's efforts to trace the emergency call to ascertain the caller's telephone number.

Goode testified that Charles Jackson was her brother, and that she received a telephone call from him "just before lunch." (R. 1120.) The following exchange then occurred:

> "[Prosecutor]: Okay, and after you spoke with your brother, did you call 911?
>
> "[Goode]: Yes.

"[Prosecutor]: And what did you tell them when you called?

"[Defense counsel]: Judge, I object, and could we have a sidebar?

"THE COURT: All right.

"(At this time, a bench conference was held off the record.)

"[Defense counsel]: Your Honor, [the prosecutor] did not ask what was told her, but this appears to be the same thing as hearsay. And he's asking her to relay her conclusions concerning the truth of what was conveyed to her. And it seems like it's just a back door attempt to get hearsay in. And it seems like that we need to call Mr. Jackson first as to what he told his sister. And I haven't thought about it until just now, but it seems like it's just a way to get around the hearsay rule because it's clearly—if he asks the witness what Charles Jackson told, then he's getting into—

"[Prosecutor]: Well, Your Honor, that's correct, but I don't think that qualifies as hearsay. But I'm showing what he told her for her state of mind that caused her to call 911. But that would go to the truth of the statement that she made and her actions as a result of that phone call, and I don't think it is hearsay.

"The Court Well, what are you offering it for?

"[Prosecutor]: All I'm going to do is ask did she call 911 and about what time. And the record has already been entered into evidence,

and I'm basically-well, she was the one that made the call, and that's all this is.

"[Defense counsel]: Well, this will necessitate us having to get Charles Jackson subpoenaed here at some point, and I'm not sure if he's been subpoenaed, but I guess I can ask her.

"THE COURT: All right; I'll overrule your objection.

"[Prosecutor]: Now, when did you call 911?

"[Goode]: When?

"[Prosecutor]: Yes, ma'am.

"[Goode]: It was about lunchtime.

"[Prosecutor]: And, again, on December 25, 2001?

"[Goode]: Yes.

"[Prosecutor]: And do you recall what you told them?

"[Goode]: Do I recall what I told them?

"[Prosecutor]: Yes, ma'am.

"[Goode]: I told them that my brother had called me and said that Tammy had called him

"[Defense counsel]: Judge, I object to what Charles Jackson has told. That would be hearsay.

"[Prosecutor]: Well, I think she's reciting the conversation that she had with the 911 operator.

"THE COURT: I'll allow her to testify about that.

"[Prosecutor]: Now, what did you tell the 911 operator?

"[Goode]: I told the 911 operator that there was two bodies in a home on Wallace Lane and that this guy had killed them and that they were in that home.

"[Prosecutor]: Okay, and did you somewhat give a description on how to get to that home?

"[Goode]: Yes, sir, I did. I said it was the second house on the left on Wallace Lane.

"[Prosecutor]: Now, do you know Ben Brownfield?

"[Goode]: No, I do not.

"[Prosecutor]: And on December 25, 2001, did you know a Tammy Farmer?

"[Goode]: No, I did not.

"[Prosecutor]: Okay, so the only person that you knew in this was Charles Jackson, your brother?

"[Goode]: That's right.

"[Prosecutor]: And you called 911 shortly before lunchtime on December 25, 2001, is that correct?

"[Goode]: Yes, sir."

(R. 1121-23.) Goode then testified that she did not identify herself during the 911 call because her husband was dying of cancer and she did not want to be involved.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), Ala.R.Evid.

We do not read Goode's testimony as being offered for the truth of any matters asserted. Rather, we read her testimony to explain why she telephoned the authorities. It is well settled that the hearsay rule "'"does not exclude extrajudicial utterances offered merely to prove the fact of the making or delivery thereof, or to explain subsequent conduct of a hearer."' *Ashford v. State*, 472 So.2d 717, 719 (Ala.Crim.App.1985), quoting 22A C.J.S. Criminal Law § 718 (1961)." *Robitaille v. State*, 971 So.2d at 57 (Ala.Crim.App.2005). See also *Stallworth v. State*, 868 So.2d 1128 (Ala.Crim.App.2001). Thus, the testimony was not inadmissible hearsay evidence.

Brownfield also avers that in the context of the evidence—i.e., Farmer's earlier testimony that Brownfield had confessed to her and that she had telephoned her boyfriend Jackson and told him of Brownfield's confession, coupled with Goode's testimony that Jackson was her brother—Goode's testimony had the effect of "repeating definite complaints of a particular crime by the accused, [that were] so likely to be misused by the jury as evidence of the fact asserted that it should [have been] excluded as hearsay.'" (Brownfield's brief at p. 45, quoting *Moseley v. State*, 570 So.2d 719, 721 (Ala.Crim.App.1990).) However, we note that at no point did Goode testify that Brownfield was involved in the killings, i.e., she did not identify the killer as anyone other than "this guy."

Moreover, even if the complained-of testimony was inadmissible hearsay, we would find no reversible error.

> "'"[T]estimony that may be inadmissible may be rendered harmless by prior or subsequent lawful testimony to the same effect or from which the same facts can be inferred." *White v. State*, 650 So.2d 538, 541 (Ala.Cr.App.1994), overruled on other grounds, *Ex parte Rivers*, 669 So.2d 239 (Ala.Cr.App.1995). . . . "The erroneous admission of evidence that is merely cumulative is harmless error." *Dawson v. State*, 675 So.2d 897, 900 (Ala.Cr.App.1995).'"

Gavin v. State, 891 So.2d 907, 970 (Ala.Crim.App.2003), quoting *Flynn v. State*, 745 So.2d 295, 307 (Ala.Crim.App.1999). See also *McNair v. State*, 706 So.2d 828, 851 (Ala.Crim.App.1997). Farmer's telephone call to Jackson telling him of Brownfield's alleged actions and confession was already before the jury through previous testimony. So, too, was testimony that a caller had telephoned the police and alerted them to the presence of two bodies in the residence—Duncan testified that such a call had been made and the 911 operator's dispatch log had been entered into evidence. Thus, those facets of Goode's testimony, even if inadmissible, were rendered harmless by earlier testimony to the same effect.

As to the lone remaining aspect of her testimony, i.e., that Jackson told her that Farmer had told him about the bodies, that detail was clearly harmless in light of the evidence presented at

trial. It was undisputed that the police had already begun investigating the case upon the discovery of Latham's body sometime before Goode's call to the police. Additionally, there was an abundance of evidence that Brownfield confessed repeatedly to committing the crimes, both to Farmer and to law-enforcement officials upon his arrest and in subsequent interrogations. Therefore, even if the admission of Goode's testimony was error, it was harmless. See, e.g., *Stallworth v. State*, 868 So.2d 1128 (Ala.Crim.App.2001). See also Rule 45, Ala.R.App.P.[8]

D.

Brownfield further contends that the trial court improperly prevented him from introducing the full text of statements made by a deceased individual after the State had first introduced part of that statement.

The State played for the jury a videotape of Brownfield's confession to the police. In that video, an investigator told Brownfield that "a couple of witnesses" or "some folks" claimed to have seen Brownfield at the Wallace Lane residence; the officer then stopped mid-sentence and asked whether Brownfield remembered having to have

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[8] We note that at the request of the defense, the trial court cautioned the jury that the 911-dispatch log was not offered for the truth of the matter asserted. We also note that no such instruction was requested or given with regard to Goode's testimony regarding her statements during the 911 call. While the better practice may have been to give a limiting instruction, in the context of this case based on the evidence presented at trial, the lack of such a limiting instruction did not amount to reversible error.

his automobile jump-started. Brownfield responded that "that was before" and that that had occurred on "Sunday morning" and that he had not gone back to the Wallace Lane residence after committing the acts.[9] According to Brownfield, the prosecutor also elicited testimony at trial indicating that Brownfield was seen taking, and later in possession of, a 1985 white Chrysler automobile. This, Brownfield contends, provided an inference that Brownfield was the person the witness claimed to have seen at the Wallace Lane residence on December 24. According to Brownfield, the witness, who was not identified on the videotape, was Charles Erskin Smith, whom police had interviewed on December 25 and December 26. However, Smith had since died and was thus unavailable to testify at trial. Brownfield claims that the remainder of Smith's statement included a description of the person Smith claimed to have seen and that that description did not match Brownfield. We note the following excerpt from the transcript:

> "[Defense counsel]: Judge, our argument is that what they did on the videotape is they asked a question, which in that question it says that they had a witness that saw somebody driving an '85 white Chrysler at the scene on the 24th at Wallace Lane. *And, of course, the inference was that it was Ben.* And on the videotape, Ben denied that and said that that happened but it happened the day before. And our information is that that

[9] This Court notes that December 23, 2001, was a Sunday.

witness has now died, and, of course, that would normally be hearsay. But we want to make the argument that they have essentially introduced part of that statement, and we would like to introduce the rest of the statement. *The statement of the description of the individual does not or is not consistent with Brownfield. You know, it's a smaller individual and that's what we want to introduce, and we think because they've been able to essentially introduce part of that statement, then we just want to introduce the rest of it.*

"[Prosecutor]: Well, Judge, our position is that the defendant [sic] I think, is deceased, and I believe that is correct and that there is nothing in the rules of evidence or the law that permits that statement to come in or hearsay about that statement to comes in. And it does not fall within any of the exceptions to the rules.

"THE COURT: I would agree with that, but how do you address the fact that the question was asked in the statement or interrogation of the defendant?

"[Prosecutor]: Well, judge, I guess my answer to that would be that if that's the case, then any information that officers use in the interrogation or in questioning witnesses would be subject to being brought in outside the hearsay rules which again I just don't think the law says-well, the law says that hearsay can come in based on, you know, if it's a dying declaration which there's no contention that that's here. But if there has been a court

proceeding and there's been testimony and the availability to cross-examine on that issue by the other party which we don't have here, so I don't know of any basis under the law that it would come in.

"[Defense counsel]: Well, we could put on the record that this is a denial of my client's due process rights. The State is having its cake and eating it, too. *They're able to, through the videotape, introduce an inference that my client was there on 12/24 and that someone saw him there.* And now we're being denied the right to cross-examine their knowledge about that. You know, they're getting in what they want to get in, but the truth is according to the written statement-there's two statements, and this is the only two-statement witness that I know of. Now, I could be wrong, but according to my files, this is the only two-statement witness, so this witness was very important to the State. And they went back—I believe Detective Petty went back—well, [Detective Shane] Clarke went first and then I believe Detective Petty went back. And I believe Detective Petty testified yesterday that he felt like that he needed to clarify, and I may be wrong as to exactly what he said, but it was something to that effect. But now we're being precluded it appears. *And we're asking for the right to not be precluded from getting the information that rebuts their allegation and assertion to the jury.* We need the jury to hear the whole statement, and I didn't research what rule that is that [the prosecu-

tor] has referred to. But, first, it sounds good, but, secondly, I am familiar that there is some type of rule that addresses, you know, if a partial statement is introduced that the whole thing should come in. Now, for more of a better argument, it seems to me that just fairness and due process rights *because the jury is going to be left with the inference that Mr. Brownfield was back there on 12/24, believe, around noon or whenever that took place according to the question through the video.*

"THE COURT: But he denied that he was there that day, correct?

"[Defense counsel]: He did deny that.

"THE COURT: And he said that he was there but said that it happened the next day?

"[Defense counsel]: Well, the whole presumption of the video is that this man has done this and he's involved and our story or the State's story or the law enforcement's story is what you believe. And there is direct evidence that rebuts that as there will be a lot of other evidence that rebuts it. But on this specific issue, we're prevented from getting that in. And, again—

"THE COURT: *Well, you've got it in that there was someone else reported at the residence on the 24th, and it wasn't the defendant.*

"[Defense counsel]: Well, I agree with Your Honor on that point absolutely, I agree. *But what we're not being able to get in, Your Honor, is the very description of this person, which is in no way the same person as Ben*

Brownfield according to the witness. And, again, the State has had every opportunity-well, I believe their objection here is that they will not have a right to cross-examine this witness who is now deceased. But they're not the ones that took-well, I'm not saying [the prosecutors], but the State or the prosecution is the one that had the opportunity to at least two times talk to this witness. And if they needed to talk to him anymore, you know, either him or others to further corroborate his statements, then they have had the opportunity to do so. And it would be unfair and a denial of my client's due process rights from being able to put this in and on that ground alone plus the ground that Gary argued.

"[Prosecutor]: Well, Judge. I believe the defense received a copy of that statement.

"[Defense counsel]: Your Honor, we'll concede to that. You know, we've had that statement, and I don't know exactly when we got it, but I'm not going to argue that the State has withheld that statement because—

"[Prosecutor]: Well, my point being is that they had an opportunity just as the State did to talk to that witness further. And it would not have changed the issue here in court if the witness has since deceased. But any further reference to that statement outside of the video in which the defendant denied being there that particular date was brought up in questioning by the defense attorneys not by the State.

> "[Defense counsel]: And the fact that we had an opportunity to speak to him, I'm not denying. But I'm not seeing the relevance of that in the context of this argument. You know, if we had talked to him for three hours, then where does that put us in this argument because we would still be at the same place? And, again, we're not disputing his statement at all. You know, whatever it says on its face is what we think the jury should hear.
>
> "THE COURT: Well, I still see it as hearsay, and I don't see that there's an exception to that rule."

(R. 1289-93.) (Emphasis added.)

As the trial court noted, the defense elicited testimony refuting the inference alluded to in the videotape. On cross-examination of Investigator Hood, the following exchange occurred:

> "[Defense counsel]: Now, are you aware of someone in the Scottsboro Police Department interviewing a gentleman on 12/24—well, I'm sorry, that interviewed a gentleman sometime after 12/25 of 2001 that purportedly saw a male approximately 5'7" or 5'8" in height at Wallace Lane on or about 12:00 noon on 12/24?
>
> "[Prosecutor]: Judge, I object to the hearsay.
>
> "[Defense counsel]: Well, I just want to know if he's aware of that.
>
> "THE COURT: Overruled.
>
> "[Investigator Hood]: I'm not aware-well, there was a number of witnesses that state-

ments were taken from, but there was one guy that said that he [jump-started] a white car at Wallace Lane.

"[Defense counsel]: And was that along about noon on 12/24?

"[Investigator Hood]: I believe that's right.

"[Defense counsel]: And that person did not fit the description of the defendant; is that your understanding?

"[Investigator Hood]: Well, Mr. Brownfield said that he remembered when he got [jump-started].

"[Defense counsel]: But the individual description of that man-now, I'm not asking you what my client said. I'm asking you, do you know what the witness is claiming?

"[Investigator Hood]: Well, I don't know what his specific description was because I didn't take that statement."

(R. 1229-30.) Investigator Petty testified on cross-examination that he estimated Brownfield to be approximately six feet tall and to weigh approximately 230 pounds. The following exchange then occurred:

"[Defense counsel]: Now, you took a statement from a Mr. Charles Erskin Smith on 12/26; is that correct?

"[Investigator Petty]: Yes, sir.

"[Defense counsel]: Can you tell us about that statement and what led you to him, you know, to take a statement?

"[Prosecutor]: Judge, I would object to hearsay, you know, if he's going into that statement

"[Defense counsel]: Well, I don't think I've done that yet.

"THE COURT: Overruled.

"[Defense counsel]: Now, what led you to Mr. Smith?

"[Investigator Petty]: Well, he had already been interviewed earlier.

"[Defense counsel]: And do you know by whom?

"[Investigator Petty]: Detective Clarke, I believe.

"[Defense counsel]: Now, I'm Sorry, but do you have knowledge that Detective Clarke initially interviewed a Charles Erskin Smith?

"[Investigator Petty]: Yes, sir.

"[Defense counsel]: And then later, you went and interviewed him yourself; did you not?

"[Investigator Petty]: Yes, sir.

"[Defense counsel]: Why did you do that?

"[Investigator Petty]: I went to get a little more detail of what Mr. Smith had seen and done.

"[Defense counsel]: Okay, but as a result of either one of these interviews, did that produce a lead related to this case? And we've talked about what a lead is—

"[Investigator Petty]: Yes, I understand what you're saying, but he had mentioned a person that he had [jump-started] at the residence and he had given a height and weight—

"[Prosecutor]: Judge, I object to hearsay evidence being testified to.

"[Defense counsel]: Judge, I know [the prosecutor] is right, but may we approach on this because I think this is an issue that we need to take up.

"THE COURT: Yes.

"[Defense counsel]: Judge, this gentleman, and I don't believe I've asked him yet, but I believe he's deceased. And at some point, we would like to in some way get in the record what these two interviews were about.

"THE COURT: I'm going to sustain at this time."

(R. 1261-62.)

According to Brownfield, he should have been permitted to introduce Smith's full statements to law enforcement, statements he contends constituted exculpatory hearsay to rebut the prosecution's inculpatory hearsay, i.e., the reference by investigators during the interrogation that someone had seen someone in a white Chrysler automobile at the Wallace Lane residence on December 24. However, even assuming that Brownfield is correct and the defense should have been allowed to introduce the full text of the officers' notes on Smith's statements—and we make no such determination that error actually

occurred—Brownfield would not be entitled to any relief because the error, if any, was harmless.

As the trial court noted, there was already evidence before the jury rebutting any inference that a witness saw Brownfield at the Wallace Lane residence on December 24.[10] On the videotaped interview with authorities, Brownfield denied returning to the residence at any time after the killings; instead, he stated that he had been there on the morning of December 23 needing to be jumped off to get the automobile started. Further, defense counsel's cross-examination of Investigators Hood and Petty created the inference that the witness had given a description that did not match Brownfield's height and weight. Additionally, we note that the defense later called Joy Watts, who testified that she lived next door to Brenda McCutchin at the time of the murders. Ms. Watts testified that around noon on December 24, 2001, a man came to her house asking if she had any jumper cables to jump-start his automobile according to Watts the automobile was parked at McCutchin's house. Ms. Watts observed Brown field in the courtroom and then stated that Brownfield was not the man who came to her front door asking for jumper cables.

In *Houston v. State*, 565 So.2d 277, 281 (Ala.Crim.App.1990), this Court stated that "[t]he

[10] We note that the officer on the videotape did not state that a witness had seen Brownfield at the Wallace Lane residence on December 24. Rather, the officer asked Brownfield why he went back to the residence, told Brownfield that some folks had seen him at the residence, and asked Brownfield if he remembered getting his automobile jump-started.

exclusion of admissible evidence does not constitute reversible error where the evidence 'would have been merely cumulative of other evidence of the same nature, which was admitted.'" Further, "[t]his is true even where the cumulative evidence which is excluded relative to the defense being presented." *McLeod v. State*, 581 So.2d 1144, 1153-54 (Ala.Crim.App.1990). We note that Brownfield relies on this Court's opinion in *Nettles v. State*, 683 So.2d 9 (Ala.Crim.App.1996), to support his contention that he was entitled to introduce the statements in full. In *Nettles*, this Court acknowledged the rule set out in *Houston*, but concluded that the excluded evidence in *Nettles* was not cumulative to the evidence presented at trial in that the only evidence presented was Nettles's own direct testimony. Thus, we held that the excluded evidence "'lent a new aura of credibility,'" *Nettles*, 683 So.2d at 13. However, Brownfield's reliance on *Nettles* is misplaced, in that here there was testimony other than Brownfield's own denials during the interrogation to corroborate his denial that he was at the Wallace Lane residence on December 24. In addition to Brownfield's statements during the videotaped interrogation, the jury was presented with Investigator Petty's estimation of Brownfield's weight and height, and with Ms. Watts's testimony that Brownfield was not the man who came to her door at noon on December 24th and requested jumper cables and her testimony regarding that individual's height, weight, and general appearance. Thus, because the excluded evidence was cumulative to other evidence properly before the jury, it is clear in this case that the trial court's refusal to

allow the defense to elicit hearsay evidence in the form of the statements of a deceased witness to law-enforcement officers investigating the murders was, if error at all, harmless error. See Rule 45, Ala.R.App.P. See also *Smith v. State*, 745 So.2d 922 (Ala.Crim.App.1999) (exclusion of witness was harmless error).

E.

Brownfield also contends that the trial court erred in allowing forensic scientist Nancie Jones to testify as an expert witness because, he claims, PCR DNA analyses was outside of her area of expertise.[11] Specifically, he argues that Jones had undertaken no coursework in human genetics; that she was not board-certified in any of the areas employed in PCR DNA analysis; and that her past involvement in published research was limited to methods of testing other than PCR DNA analysis.[12]

[11] We note that Brownfield does not challenge the admissibility of the DNA evidence itself. Rather, his specific arguments take issue with Jones's qualifications as an expert. Thus, we need not discuss in detail the admissibility of the evidence itself other than to note that there was no error, plain or otherwise, in the admission of the DNA evidence at trial. See generally *Blackmon v. State*, [Ms. CR-01-2126, Aug. 25, 2006] —So.2d— (Ala.Crim.App.2005) (opinion on application for rehearing) (dis-cussing the application of the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), analysis to determine the admissibility of PCR DNA evidence.).

[12] The State avers that this issue is raised for the first time on appeal. We note that Brownfield filed a motion challenging the admissibility of the DNA evidence prior to trial, and that the trial court conducted a hearing outside of the

"'Whether a witness is sufficiently qualified to testify as an expert is a question for the trial court to resolve in its discretion, and its ruling will not be disturbed on appeal unless it has abused that discretion.' *Smith v. State*, 698 So.2d 189, 205 (Ala.Crim.App.1996), aff'd, 698 So.2d 219 (Ala.1997). Moreover, '[i]t is for the jury to determine the weight and credibility of an expert witness's testimony.' *Kilcrease v. John Deere Indus. Equip. Co.*, 663 So.2d 900, 902 (Ala.1995)."

Adams v. State, 955 So.2d 1037, 1089 (Ala.Crim.App.2003), rev'd in part, on other grounds, 955 So.2d 1106 (Ala.2005).

Here, Jones, a forensic scientist with the Alabama Department of Forensic Sciences, testified extensively as to her training and experience with DNA testing; as to the procedures employed by her laboratory during PCR DNA testing; and as to PCR DNA testing in general. She testified that she had been employed as a forensic scientist since 1994 and that she was formerly employed as a laboratory technician in what is now the forensic-biology section from 1988 until 1992. She stated that she had a bachelor of science degree from Athens State College and that she had completed graduate level course work at Alabama A & M University and the University of Alabama

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hearing of the jury to determine the admissibility of the evidence. At that hearing, Brownfield questioned Jones extensively as to her knowledge, skill, training, and areas of expertise. It appears that the trial court understood Brownfield's questioning to challenge Jones's competency to testify as an expert on the proffered DNA evidence. Even assuming that the specific allegations were preserved for appellate review, for the reasons that follow, we find no error, plain or otherwise.

at Birmingham, including courses in genetics, molecular biology, biochemistry, and statistics. She testified that she had on-the-job training and had participated in workshops co-sponsored by the FBI and her laboratory to learn to perform PCR DNA analysis. She stated that she was a member of the American Academy of Forensic Sciences, a member of the Southern Association of Forensic Sciences, and a member of the Association of Forensic DNA Analysts and Administrators. She testified that she was the training officer for new forensic scientists hired by her department, having previously trained three forensic scientists and training a fourth. She stated that her laboratory undertakes technical and administrative reviews of their notes and reporting, and technical reviews of their DNA process; she further stated that she underwent proficiency testing at least twice a year to compare their own proficiency to that of other scientists at laboratories around the nation, and that she had never failed a proficiency test. She also testified as to the national certifications held by her laboratory, and described in detail the procedures employed by her laboratory in conducting DNA testing, including those employed during PCR DNA testing. She testified that although she did not hold a Ph.D. or board certification in any scientific disciplines, the Department of Forensic Sciences had no such requirements for forensic scientists. She testified that she conducted "probably hundreds" of DNA tests a year and that she had previously testified as an expert in DNA testing five or six times. (R. 1433.) Clearly, Jones's testimony supported the trial court's decision to allow her to testify as an

expert witness. Having reviewed the record, we find no abuse of the trial court's discretion in determining that Jones was qualified to testify as an expert on the State's DNA evidence.

F.

Brownfield further claims that the trial court improperly allowed Dr. Melissa Clinger, Brownfield's court-appointed psychologist, to testify during the guilt phase of his trial about information he had provided her during her mental examination of Brownfield.

> "The general rule is that by actively pursuing an insanity defense and by introducing testimony of qualified psychologists or psychiatrists as defense witnesses, the defendant waives any potential psychotherapist-patient privilege or privilege against self-incrimination against subsequent qualified testimony or rebuttal. *Ex parte Day*, 378 So.2d 1159 (Ala.1979); *Salmon v. State*, 460 So.2d 334 (Ala.Cr.App.1984); *Magwood v. State*, 426 So.2d 918 (Ala.Cr.App.1982).
>
> "Fifth Amendment problems may arise, however, when an examining psychiatrist or psychologist is allowed to give testimony based upon conversations with a criminal defendant. Rule 11.2(b), Ala.R.Cr.P., addresses this problem by limiting such testimony to the mental condition of the accused."

Williams v. State, 710 So.2d 1276, 1299 (Ala.Crim.App.1996). Rule 11.2(b), Ala.R.Crim.P.,

provides for the admissibility of mental examinations, as follows:

> "(1) The results of examinations conducted pursuant to subsection (a)(1) of this rule, Rule 11.3, or Rule 11.4 on the defendant's mental competency to stand trial shall not be admissible as evidence in a trial for the offense charged and shall not prejudice the defendant in entering a plea of not guilty by reason of mental disease or defect.
>
> "(2) The results of mental examinations made pursuant to subsection (a)(2) of this rule and the results of similar examinations regarding the defendant's mental condition at the time of the offense conducted pursuant to Rule 11.4 shall be admissible in evidence on the issue of the defendant's mental condition at the time of the offense only if the defendant has not subsequently withdrawn his or her plea of not guilty by reason of mental disease or defect. Whether the examination is conducted with or without the defendant's consent, no statement made by the defendant during the course of the examination, no testimony by an examining psychiatrist or psychologist based upon such a statement, and no other evidence directly derived from the defendant's statement shall be admitted against the defendant in any criminal proceeding, except on an issue respecting mental condition on which the defendant has testified."

Before trial, Brownfield underwent a court-ordered evaluation administered by Dr. Clinger in August 2002 to determine Brownfield's compe-

tency to stand trial and his mental state at the time of commission of the offenses. Dr. Clinger's forensic evaluation report contains the following:

> "Prior to beginning the interview, the defendant was informed as to the purpose of the evaluation and limited confidentiality of the information to be obtained. He was told the results will be submitted in the form of a report to the Court, the defense attorney, and the District Attorney. He was also informed that these results may be used in court proceedings either through testimony of the examiner and/or the written report, to assist reaching decisions regarding his competency to stand trial and his mental state at the time of the alleged offense, but that none of the information could be used as evidence against him concerning his guilt on any charge. An explanation that this information might be used during the penalty phase as aggravating or mitigating factors was added. Mr. Brownfield indicated he understood the purpose and limited confidentiality of the evaluation, and he reviewed and signed a written notification form indicating his willingness to proceed with the interview."

(C. 115.)

At the onset of the guilt phase of the trial, defense counsel confirmed that Brownfield was proceeding under his pleas of not guilty and not guilty by reason of mental disease or defect. (R. 768.) Throughout his opening statements, defense counsel repeatedly stated that the murders were the result of Brownfield's addiction to methamphetamine. Defense counsel stated, among other

many comments: "This is a case about death by meth." (C. 776); "You will hear evidence that my client was totally submissive to the drug, meth, and that his brain was basically fried and that he had very, very little cognitive ability to do anything." (C. 777); "[M]y client suffered from amnesia and confusion." (R. 777-78); and "[Y]ou're going to hear testimony of what it means to falsely confess; and you're going to hear evidence of what a false memory is. You will hear evidence from a psychiatrist that these conditions exist in this case." (R. 778.)

Throughout the State's case during the guilt phase of the trial, Brownfield clearly attempted to elicit evidence challenging his mental status at the time of the offenses, i.e., attempting to show that the murders were committed while he was under the influence of Xanax and crystal methamphetamine.

During the defense's case, Dr. Roger Lacy testified as an expert for the defense; he testified that he had examined the videotaped confessions, the police reports, Dr. Clinger's report, and the report prepared by Dr. Joseph Embry of the Alabama Department of Forensic Sciences, and had interviewed Brownfield. According to Dr. Lacy, at the time of the murders, Brownfield was "confused, he was in a drug soup." (R. 1736.) Dr. Lacy further testified that at the time he purportedly waived his *Miranda* rights, Brownfield was "like a two-year-old, you know, being confused and befuddled, delirium." (R. 1737.) Finally, Dr. Lacy stated that, at the time he made the confessions, Brownfield's mental status was "confused with gradual changing from about a two-year-old

at the beginning to maybe the level of about a ten-year-old at best at the end." (R. 1737.) He further stated that Brownfield's statements were involuntary and that Brownfield could not have made a knowing, voluntary, or intelligent statement. Dr. Lacy further testified that Brownfield was unable to remember anything from the interrogations. According to Dr. Lacy, Brownfield, because of his mental state as a result of his drug ingestion, was in a highly suggestive state and assimilated information and details relayed to him during the interrogations as his own memories, an occurrence Dr. Lacy characterized as a "false memory." Dr. Lacy stated that Brownfield, at the time of the confessions, would not have been able to recognize that he was a suspect, would not have recognized the severity of the legal implications of what he was saying, would not have recognized the police investigators as adversaries, and would not have been able to recognize or understand his rights. Dr. Lacy further stated that at the time of the murders, Brownfield was in a state of delirium and would not have understood or accurately interpreted the events taking place around him.

At the conclusion of the defense's case, the State called Dr. Clinger as a rebuttal witness. Dr. Clinger testified without objection that she had examined Brownfield to determine his sanity at the time of the offenses; she stated that she gathered information from the district attorney's office and from defense counsel and had met with Brownfield twice for a total of approximately four or five hours. When asked what information she used to diagnose Brownfield, defense counsel objected and requested a sidebar, at which time a

bench conference was held off the record. Upon the conclusion of that bench conference, Dr. Clinger testified without objection that her goal was to evaluate Brownfield and to assess his treatment needs, if any. She stated that she performed a diagnostic clinical interview and administered an IQ test; she testified without objection as to her conclusions regarding his intellectual status and mental ability. Dr. Clinger testified that Brownfield was able to recall and repeat information to her, including arithmetic problems she posed to him, his educational background, and his work history. The following exchange then occurred:

> "[Prosecutor]: All right; did he have any memory at all as to his activities on December 23, 24 and 25?
>
> "[Dr. Clinger]: He was able to provide me with an account of what he was doing during most of that time.
>
> "[Prosecutor]: All right; was he able to recall getting into a verbal dispute with his sister on the 23rd?
>
> "[Dr. Clinger]: Yes.
>
> "[Prosecutor]: And what details was he able to provide regarding that?
>
> "[Dr. Clinger]: Well, it was something about—
>
> "[Defense counsel]: Judge, I object again. That goes to the very issue that I was informing you about. And that has nothing to do with this test or his assessment, and I would object.

". . . .

"(JURY NOT PRESENT.)

"The Court All right; do you want to state your objection?

"[Defense counsel]: Well, Judge, what I'm concerned about is the very front page of the forensic evaluation report prepared by Dr. Clinger, she says, and I will just read it, 'Ben Brownfield was also informed that these results may be used in court proceedings either through testimony of the examiner and/or the written report to assist reaching decisions regarding his competency to stand trial and his mental state at the time of the alleged offense but that none of the information could be used as evidence against him concerning his guilt on any charge.' Now, my objection is that this questioning, and where I believe the assistant district attorney was going with that is to get into the facts of what Mr. Brownfield has described to Dr. Melissa Clinger. And just because the court gives some kind of limiting instruction at some point that they are not to consider any of this in their determination of guilt[, it] is still highly prejudicial and will violate his rights, Your Honor—his due process rights because he was told that none of this could be used, and none of this information could be used as evidence against him. And this is a way to circumvent that by getting into the details of what he told her.

"THE COURT: Well, he has raised the issue of insanity at the time of the alleged offense, and the law is very clear that any statements that he gives to the psychologist would be admissible on that issue.

"[Defense counsel]: Well, there is no issue of insanity, and we withdraw any claim that he was insane. And we will put that on the record.

"[Prosecutor]: Judge, we would consider that to be untimely made, and they've already introduced evidence from their expert on his inability to recall the details. And if it's not admissible on his mental state at the time, it certainly is to impeach Dr. Lacy's testimony about him having no memory whatsoever of these events.

"[Defense counsel]: We are not arguing that he was legally insane. That's the term that I'm talking about, legal insanity. And nothing that we have put on or attempted to argue goes to legal insanity.

"[Prosecutor]: Well, Your Honor, that was one of the questions that we asked before we got started if he was maintaining that plea and [defense counsel] stated clearly, yes, [he] was.

"[Defense counsel]: Well, we have not put on any evidence to that effect.

"[Prosecutor]: And in fact I think he requested an instruction to that effect.

"[Defense counsel]: Well, that doesn't mean that we're going that route.

"THE COURT: Well, I asked specifically so that this issue could be addressed at the very beginning, and you told me that you definitely intended to pursue that plea of not guilty by reason of mental disease or defect. And you put on your psychiatrist.

"[Defense counsel]: Well, Your Honor, we said that we were not contesting his sanity at trial or his competency at trial. And that's what I recall telling the court that that was not going to be an issue.

"THE COURT: Right, because that issue had already been decided by the court because it had not been made an issue previously and there had been no request for a hearing on the issue of whether he was competent to stand trial.

"[Defense counsel]: Well, our position now is that we're not arguing any insanity.

"THE COURT: Well, I think it's too late. I think the door has been opened because there's been questions asked of your psychiatrist regarding that plea. So I'm going to permit her to testify. But any statements that he made to you, you can relate, you know, if they had a bearing on your assessment of his mental state at the time of the alleged offense. Otherwise, they should not be admissible in this hearing. Do you understand?

"[Dr. Clinger]: Well, Your Honor, I didn't ask if he did it or not, and he didn't tell me if he did it or not.

"THE COURT: All right; so that should take care of that.

"[Defense counsel]: Well, Judge, is the court saying that we asked our witnesses questions concerning whether the defendant was legally insane?

"THE COURT: I'm saying that questions were asked and at no time was there an objection made to those questions. And I know the psychiatrist was asked if he was suffering from a mental disease or defect, and—

"[Defense counsel]: Yes, that was asked.

"THE COURT: Right, and there was no objection made as if you had withdrawn that plea.

"[Defense counsel]: Okay, I see the court's point.

"THE COURT: All right; let's recess for lunch."

(R. 1959-63.)

Dr. Clinger then testified that Brownfield informed her that he was unhappy with his sister because on December 23, 2001, he had given her some money that she was supposed to have used to obtain drugs. Dr. Clinger testified with regard to the events of December 24 that Brownfield recalled taking a shower at Farmer's residence and riding around with his friend Nick Logan and that he told Farmer what he had done. As for Brownfield's recollection of the events on December 25, Dr. Clinger testified that Brownfield told her that he remembered the officers advising him of his *Miranda* rights. According to Dr. Clinger, she saw no indication that Brownfield suffered

from a severe mental disease or defect "ever or during the time of the alleged offense." (R. 1965.) She stated that she "thought [Brownfield] had no significant impairment as far as mental illness or cognitive deficits or problems in thinking that would have interfered with his ability to appreciate the wrongfulness of his acts and the consequences." (R. 1966.) On cross-examination, Dr. Clinger was questioned extensively about false memories. She was further questioned about Brownfield's assertions to her that he had ingested Xanax and crystal methamphetamine at times prior to the murders and the possibility that those narcotics may have affected his memory.

Initially, we question whether this claim was properly preserved for appellate review, in that a substantial amount of testimony was elicited before defense counsel's initial objection. Further, the grounds of that objection, any response from the prosecutor, and any remarks by the trial court were not transcribed for the record.

However, for the reasons that follow, we find no error, plain or otherwise, in the trial court's decision to allow the complained-of testimony.

Here, much of Brownfield's opening statement was devoted to the effects narcotics played in the murders in an attempt to portray Brownfield as a victim who had been abandoned by society. Further, Brownfield repeatedly targeted the voluntariness of his statements to the police and the rationality of his actions, both on cross-examination of the State's witnesses and in his presentation of expert testimony, to his assertion that he was under the influence of Xanax and methamphetamine at the time of the murders and at the time of his confessions. That he purported to with-

draw his plea of not guilty by reason of mental disease or defect did not close the door that he had already opened. As this Court stated in *Lee v. State*, 898 So.2d 790 (Ala.Crim.App.2001) (opinion on return to remand):

> "Even though the appellant ostensibly abandoned his plea that he was not guilty by reason of mental disease or defect, he clearly based his defense on a contention that there was something wrong with his mental condition. Therefore, Dr. Ronan's testimony about the results of her mental examination was admissible to refute his defense that there was something wrong with him, to rebut Dr. Blanton's testimony that he was psychotic and mentally retarded, and to explain the inconsistencies between her conclusions and Dr. Blanton's conclusions. Furthermore, even if the appellant was not advised of his *Miranda* rights and was not told that his statements could be used against him, Dr. Ronan's testimony about statements the appellant made was admissible pursuant to Rule 11.2(b)(2), Ala.R.Crim.P., because those statements were relevant and material to support her conclusion that he did not suffer from any mental disease or defect and that he was not mentally retarded. See *Williams v. State*, 710 So.2d 1276, 1299-1300 (Ala.Crim.App.1996), aff'd, 710 So.2d 1350 (Ala.1997). Finally, the record does not support the assertion that the State was trying to use Dr. Ronan's testimony to malign the appellant's character. Rather, it shows that the State used the testimony to rebut Dr. Blanton's testimony and to explain

> the inconsistencies between his conclusions and her conclusions. Therefore, we do not find that there was any plain error in this regard."

The reasons set forth in *Lee* are equally applicable here. The evidence was properly admitted to rebut both Dr. Lacy's testimony during the defense's case, and, to some degree, the testimony elicited by the defense's questioning of other witnesses attempting to portray Brownfield as unable to recall the events or to speak voluntarily with authorities. Therefore, we find no error, plain or otherwise, in the trial court's allowance of Dr. Clinger's testimony.

G.

Brownfield also argues that the cumulative effect of the trial court's errors mandates a new trial. Although he does not specify what errors he is referring to, we note that this claim was advanced as a subpart of his assorted evidentiary claims addressed in Part I of this opinion; thus, we construe his argument to be limited to the claims addressed in Part I.

As the Alabama Supreme Court has so succinctly stated, the cumulative-error rule is as follows: "[W]hile, under the facts of a particular case, no single error among multiple errors may be sufficiently prejudicial to require reversal under Rule 45, if the accumulated errors have 'probably injuriously affected substantial rights of the parties,' then the cumulative effect of the errors may require reversal." *Ex parte Woods*, 789 So.2d 941, 942 n. 1 (Ala.2001) (quoting Rule 45, Ala.R.App.P.). Applying this standard, we have

considered these allegations of error cumulatively, and we do not find that Brownfield's substantial rights have probably been injuriously affected.

II.

Brownfield next argues that the trial court erred in denying his challenges for cause of prospective jurors J.C., A.M., H.P., and D.W. Specifically, Brownfield contends that his challenges for cause of prospective jurors J.C., A.M., and H.P. were improperly denied because those prospective jurors initially indicated in response to general questions posed during voir dire that they would always vote to impose the death penalty for certain convictions. He also argues that prospective juror J.C. failed to affirmatively indicate, in response to a question posed during voir dire, whether he felt that a sentence of life imprisonment without parole was a serious sentence. He specifically contends that his challenge for cause of prospective juror D.W. should have been granted based on D.W.'s initial denial that she did not know one of the victims granddaughters.

As the Alabama Supreme Court explained in *Bethea v. Springhill Memorial Hospital*, 833 So.2d 1 (Ala.2002), error in the trial court's refusal to remove a prospective juror for cause is subject to the harmless-error analysis:

> "The application of a 'harmless-error' analysis to a trial court's refusal to strike a juror for cause is not new to this Court; in fact, such an analysis was adopted as early as 1909:

"'The appellant was convicted of the crime of murder in the second degree. While it was error to refuse to allow the defendant to challenge the juror C.S. Rhodes for cause, because of his having been on the jury which had tried another person jointly indicted with the defendant, yet it was error without injury, as the record shows that the defendant challenged said juror peremptorily, and that, when the jury was formed the defendant had not exhausted his right to peremptory challenges.'

"*Turner v. State*, 160 Ala. 55, 57, 49 So. 304, 305 (1909). However, in *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), overruled on other grounds, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court stated, in dicta, that '[t]he denial or impairment of the right is reversible error *without a showing of prejudice*.' (Emphasis added [in *Bethea*].) Some decisions of this Court as well as of the Alabama Court of Criminal Appeals reflect an adoption of this reasoning. See *Dixon v. Hardey*, 591 So.2d 3 (Ala.1991); *Knop v. McCain*, 561 So.2d 229 (Ala.1989); *Ex parte Rutledge*, 523 So.2d 1118 (Ala.1988); *Ex parte Beam*, 512 So.2d 723 (Ala.1987); *Uptain v. State*, 534 So.2d 686, 688 (Ala.Crim.App.1988) (quoting *Swain* and citing *Beam* and *Rutledge*); *Mason v. State*, 536 So.2d 127, 129 (Ala.Crim.App.1988) (quoting *Uptain*).

> ". . . [T]his Court has returned to the 'harmless-error' analysis articulated in the *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), and [*United States v.*] *Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000), decisions. Because a defendant has no right to a perfect jury or a jury of his or her choice, but rather only to an 'impartial' jury, see Ala. Const.1901 §6, we find the harmless-error analysis to be the proper method of assuring the recognition of that right.
>
> "In this instance, even if the Betheas could demonstrate that the trial court erred in not granting their request that L.A.C. be removed from the venire for cause (an issue we do not reach), they would need to show that its ruling somehow injured them by leaving them with a less-than-impartial jury. The Betheas do not proffer any evidence indicating that the jury that was eventually impaneled to hear this action was biased or partial. Therefore, the Betheas are not entitled to a new trial on this basis."

833 So.2d at 6-7 (footnotes omitted). See also *Calhoun v. State*, 932 So.2d 923 (Ala.Crim.App.2005). Here, as in *Bethea*, Brownfield has offered no evidence that the jury ultimately impaneled was biased. Brownfield concedes in his brief that he exercised a peremptory challenge to remove D.W. from the venire, and it is apparent from the record that prospective jurors J.C., A.M., and H.P. were not selected to serve on the jury empaneled to hear the case.

Therefore, even if the trial court's refusal to remove the complained-of venire members for cause was error, the error was harmless.

Moreover, we note with regard to prospective jurors J.C., A.M., and H.P., that "[j]urors who give responses that would support a challenge for cause may be rehabilitated by subsequent questioning by the prosecutor or the court." *Johnson v. State*, 820 So.2d 842, 855 (Ala.Crim.App.2000). "The crucial inquiry is whether the veniremen could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment." *McNabb v. State*, 887 So.2d 929, 944 (Ala.Crim.App.2001), quoting other cases. Here, although each of the three complained-of prospective jurors gave initial responses during voir dire indicating strong support in the application of the death penalty, each also indicated that they could set aside any predetermined feelings about the death penalty and follow the trial court's instructions. Therefore, there was no error in the trial court's refusal to remove prospective jurors J.C., A.M., and H.P. for cause.

Admittedly, the questions surrounding prospective juror D.W. raise a closer question in that there was some question as to whether a child of D.W.'s brother was Latham McCutchin's granddaughter. We note the following individual voir dire:

> "THE COURT: [D.W.], I had some questions that I wanted to ask you. One of the potential witnesses in this case saw your name and thought that you might be related to [T.C.] who is Latham McCutchin's daughter. And I

believe the relationship would be that this potential witness thought that you might be the aunt of [T.C.]s' daughter; is that correct?

"PROSPECTIVE JUROR [D.W.]: The only [T] that I know is a [T] that was with my brother when they were in high school, and they did have a child together. But I don't have anything to do with her, you know, I just know her on a first name basis. And, you know, I don't know her last name, and I don't know the mother.

"THE COURT: So you could be the aunt of [T.C.]s' child; is that correct?

"PROSPECTIVE JUROR [D.W.]: Yes.

"THE COURT: But you don't know her or the child?

"PROSPECTIVE JUROR [D.W.]: No.

"THE COURT: Now, the fact that your niece, I guess it would be the granddaughter of one of the alleged victims, Mr. Latham McCutchin, would that have any impact on your verdict in this case?

"PROSPECTIVE JUROR [D.W.]: No, because I have no idea of who it is.

"THE COURT: And the fact that there would be some relationship, that would have no effect whatsoever?

"PROSPECTIVE JUROR [D.W.]: Well, I don't know them. So if I never knew them, how could I hold them accountable? You know, it's like—

"THE COURT: Well, it would be in this case that you might have more sympathy towards them because you have come connection with the family.

"PROSPECTIVE JUROR [D.W.]: I can't have any sympathy towards anybody that I don't know.

"THE COURT: All right; thank you. Do y'all have any questions?

"[Defense counsel]: No.

"[Prosecutor]: I think you were asked about the names, [R.M.] and [T.C.], and you don't know either of those people?

"PROSPECTIVE JUROR [D.W.]: Not on a personal basis, you know, I know of them. You know, like, I don't know the McCutchins at all, and the only one I know is the daughter that is possibly my brother's child.

"[Prosecutor]: And what is that daughter's name?

"PROSPECTIVE JUROR [D.W.]: [R], and I only know her on a first name basis, and I've only seen her, like, three times. And I don't know her birthday, and I don't know how old she is.

"[Prosecutor]: That's all.

"THE COURT: Was paternity ever established?

"PROSPECTIVE JUROR [D.W.]: I really don't know.

"THE COURT: So your brother was not married to [T.C.]?

> "PROSPECTIVE JUROR [D.W.]: No, it was just a fling, you know, something that happened during high school. And it was possible, but I don't know anything for sure, and I don't know anything about it."

(R. 722-24.)

Thus, although Brownfield exercised a peremptory strike to remove D.W. from the venire, it is clear from the following exchange that this was not the type of close familial relationship that normally gives rise to concerns about partiality. The trial court thoroughly questioned the prospective juror about her possible relationship with the victim and his family and determined that the challenge for cause was due to be denied. We agree with the trial court.

For these reasons, Brownfield is not entitled to any relief on this claim.

III.

Brownfield next argues that Alabama's statutory capital-sentencing scheme is constitutionally infirm for two reasons: (1) that pursuant to *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the jury, and not the trial judge, must make the determination as to whether the aggravating circumstances outweigh the mitigating circumstances; and (2) that the jury's recommendation of death must be unanimous.

With regard to Brownfield's contention that the jury, rather than the trial court, should weigh the mitigating circumstances against the aggravating circumstances, we note that nothing in *Ring*

requires such an approach. Rather, in a number of opinions decided in the aftermath of *Ring*, both this Court and the Alabama Supreme Court have concluded that *Ring* did not invalidate Alabama's death-penalty statute, a statute that vests the ultimate sentence determination in the hands of the trial judge and not the jury. See, e.g., *Ex parte Hodges*, 856 So.2d 936 (Ala.2003); *Ex parte Waldrop*, 859 So.2d 1181 (Ala.2002); *Duke v. State*, 889 So.2d 1, 41 (Ala.Crim.App.2002) (opinion on return to remand), cert. granted, sentence of death vacated pursuant to *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), *Duke v. Alabama*, 544 U.S. 901, 125 S.Ct. 1588, 161 L.Ed.2d 270 (2005); *Turner v. State*, 924 So.2d 737 (Ala.Crim.App.2002); *Stallworth v. State*, 868 So.2d 1128, 1178 (Ala.Crim.App.2001) (opinion on return to second remand). In recognizing the narrowness of the United States Supreme Court's holding in *Ring*, this Court has noted that although "[t]he *Ring* Court held that any aggravating circumstance that increased a sentence to death must be proved to a jury beyond a reasonable doubt," the *Ring* Court "did not reach the question whether judicial sentencing or judicial override was constitutional." *Stallworth v. State*, 868 So.2d at 1183 (opinion on return to second remand). Further:

> "'Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United*

States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. See *Apprendi v. New Jersey*, 530 U.S. 466, 490-91, n. 16, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted [in *Ring*])). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. See *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. See *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. See *Apprendi*, 530 U.S., at 477, n. 3, 120 S.Ct. 2348, 147 L.Ed.2d 435 (Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'").'"

Stallworth v. State, 868 So.2d at 1183-84 (quoting *Ring*, 536 U.S. at 597 n. 4, 122 S.Ct. 2428).

As the Alabama Supreme Court stated in *Ex parte Waldrop:*

> "[T]he weighing process is not a factual determination. In fact, the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof. As the United States Court of Appeals for the Eleventh Circuit noted, 'While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard . . . the relative weight is not.' *Ford v. Strickland,* 696 F.2d 804, 818 (11th Cir.1983). This is because weighing the aggravating circumstances and the mitigating circumstances is a process in which 'the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence.' *Tuilaepa v. California,* 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Moreover, the Supreme Court has held that the sentencer in a capital case need not even be instructed as to how to weigh particular facts when making a sentencing decision. See *Harris v. Alabama,* 513 U.S. 504, 512, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) (rejecting 'the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"' (quoting *Franklin v. Lynaugh,* 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)) and holding that 'the Constitution does not require a State to ascribe any specific weight to particular fac-

tors, either in aggravation or mitigation, to be considered by the sentencer').

"Thus, the weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum. See *California v. Ramos*, 463 U.S. 992, 1008, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) ('Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury[ ] then is free to consider a myriad of factors to determine whether death is the appropriate punishment.'); *Zant v. Stephens*, 462 U.S. 862, 902, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (Rehnquist, J., concurring in the judgment) ('sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does').

"In *Ford v. Strickland*, supra, the defendant claimed that 'the crime of capital murder in Florida includes the element of mitigating circumstances not outweighing aggravating circumstances and that the capital sentencing proceeding in Florida involves new findings of fact significantly affecting punishment.' *Ford*, 696 F.2d at 817. The United States Court of Appeals for the Eleventh Circuit rejected this argument, holding that 'aggravating and mitigating circumstances are not facts or ele-

ments of the crime. Rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed.' 696 F.2d at 818. Furthermore, in addressing the defendant's claim that the State must prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, the court stated that the defendant's argument

> "'seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, see *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. [1950], 40 L.Ed.2d 295 (1974), and *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597, 617-18 (1979), the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party.'

"696 F.2d at 818. Alabama courts have adopted the Eleventh Circuit's rationale. See *Lawhorn v. State*, 581 So.2d 1159, 1171 (Ala.Crim.App.1990) ('while the existence of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative weight of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party'); see also *Melson v. State*, 775 So.2d 857, 900-901 (Ala.Crim.App.1999); *Morrison v. State*, 500 So.2d 36, 45 (Ala.Crim.App.1985).

> "Thus, the determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, *Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances."

Ex parte Waldrop, 859 So.2d at 1189-1190 (footnote omitted).

Here, in returning guilty verdicts as to the charged capital offense of burglary-murder and the capital offense of the murder of two or more people during one act or pursuant to one scheme or course of conduct, the jury of necessity unanimously found that two statutory aggravating circumstances had been proven beyond a reasonable doubt, i.e., § 13A-5-49(3) and (4), Ala.Code 1975. See, e.g., *Stallworth v. State*, 868 So.2d 1128 (Ala.Crim.App.2001) (opinion on return to remand) (if the aggravating circumstance that elevated the punishment to death was also an element of the capital offense, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), was not violated because the jury's verdict in the guilt phase found that fact to exist beyond a reasonable doubt). See also *Ex parte Waldrop*, supra (jury conviction of the capital offense of murder-robbery satisfied the requirement that an aggravating circumstance be found by the jury and the verdict itself rendered the defendant death-eligible, exposing him to a range of punishment that included the death penalty). Thus, the limited mandates of *Ring* have been satisfied in this case, because the jury unanimously

found at least one statutory aggravating circumstance, making Brownfield eligible for the death penalty. What relative weight to assign the aggravating circumstances and mitigating circumstances was for the trial court. See *Ex parte Waldrop*, 859 So.2d at 1190 ("the determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, *Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances."). Therefore, Brownfield is not entitled to any relief on this claim.

With regard to Brownfield's contention that the jury's 11-1 advisory verdict in favor of the death penalty was not a "unanimous" verdict as set out in Rule 23.1(a), Ala. R.Crim.P., which states that the "verdict of the jury shall be unanimous, shall be in writing, signed by the foreman, and shall be returned in open court," we note that the jury's verdict as to the *charged offenses* was unanimous in this case. The 11-1 vote of the jury following the sentencing hearing recommending that Brownfield be sentenced to death for his commission of the charged offenses was merely an advisory sentencing verdict. It is well settled that Alabama law allows for the jury to return an advisory verdict as to sentencing in capital-murder cases and that the jury may vote to recommend the death penalty by a vote of at least 10 jurors in favor of death (12-0, 11-1, or 10-2). Further, both this Court and the Alabama Supreme Court have upheld death sentences imposed after the jury made a nonunanimous recommendation that the defendant be sentenced to death. See, e.g.,

Ex parte McNabb, 887 So.2d 998, 1000 (Ala.2004) (jury recommended death by 10-2 vote); *Stallworth v. State*, 868 So.2d 1128, 1136 (Ala.Crim.App.2001) (jury recommended death by 10-2 vote); *Irvin v. State* 940 So.2d 331, 364-366 (Ala.Crim.App.2005) (jury recommended death by 10-2 vote). Accordingly, Brownfield's argument is without merit.

IV.

Last, as required by §13A-5-53, Ala.Code 1975, we review the propriety of Brownfield's convictions and sentence of death. Brownfield was indicted for, and convicted of, murdering three-year-old Joshua Hodges, a violation of §13A-5-40(a)(15), Ala.Code 1975; murdering Latham McCutchin during the course of a burglary, a violation of §13A-5-40(a)(4), Ala.Code 1975; and murdering Brenda McCutchin, Joshua Hodges, and Latham McCutchin, during one act or pursuant to one scheme or course of conduct, a violation of §13A-5-40(a)(10), Ala.Code 1975.

The record reflects that Brownfield's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Section 13A-5-53(b)(1), Ala.Code 1975.

The trial court's sentencing order reflects that, with regard to each capital-murder charge, the court found the existence of the aggravating circumstance that the murders were especially heinous, atrocious, or cruel:

> "Under the pretext of a friendly visit, the defendant was allowed into Latham McCutchin's home. Rather than a friendly

visit, the defendant's sole purpose of gaining entry into the home was to kill Latham McCutchin. Minutes after being invited into Latham's home, the defendant informed Latham that he was going to kill him. Immediately, Latham tried to defend himself from the defendant. He saw the defendant pull the claw hammer from his jacket and grabbed at it. During the struggle for the claw hammer, the defendant elbowed Latham and punched him several times with his fists. Dr. Embry testified that he observed a 6 1/2 inch by 1/2 inch rib bruise on Latham's lower chest. After punching Latham with his fists, the defendant began to hit Latham repeatedly with the claw hammer. Latham suffered at least ten forceful blows to the head. He had numerous lacerations to his head and fractures on his skull. Dr. Embry described the lacerations as blunt-force injuries to the scalp. He said some injuries extended all the way to the bone and the bone was driven into the brain or displaced. He described one 3-inch-by-3-inch section of bone missing from Latham's head. Latham suffered defensive wounds to his arms and hands in an attempt to ward off the defendant's blows. According to Dr. Embry, Latham suffered bruising to his forearm and hands. Latham also suffered fractured ribs and a fractured vertebra. Latham didn't die instantly. According to Dr. Embry, the bleeding around the left kidney and blood in the bladder indicates that Latham survived for a period of time. The defendant stabbed Latham in the heart with a knife leaving a 1 1/4 inch

wound over the heart and extending into it. The defendant cut Latham's throat with the knife from one side of his neck to the other. The defendant told investigators that he stabbed Latham in the chest and cut his throat because he kept breathing and making noises. He also told his girlfriend that 'they don't die instantly.' Clearly, Latham McCutchin suffered intense pain for a significant period of time prior to his death. Additionally, Latham McCutchin suffered psychologically. The court can only imagine the intense fear that Latham must have felt when his brother-in-law told him that he was going to kill him. Latham was trapped in his own home having been awakened from sleep for the night. Latham had no weapon to defend himself against the much younger and stronger defendant. He saw the defendant pull the claw hammer from his jacket and was helpless to prevent the attack on his life. The murder of Latham McCutchin was committed under circumstances that caused fear and pain to Latham before his death. Furthermore, while Latham lay dying or dead in his living room floor, the defendant wrote a message on a wall in the house. He wrote, 'This was necessary Ben. I'm sorry for your family. They deserved it.' Afterward, the defendant showered in the victim's bathroom, gathered his blood-soiled clothes, the claw hammer, and knife, and left the residence to dispose of the evidence. The court finds that Latham's murder was a conscienceless or pitiless crime and unnecessarily torturous to the victim. The

court finds that the defendant's brutality to Latham exceeds that which is normally present in a capital case.

"Brenda Whitehead McCutchin and her three-year-old grandson, Joshua Dewayne Hodges were murdered in their bed. Both Brenda and Joshua were asleep when the defendant first struck Brenda with a claw hammer. After the defendant hit Brenda with the claw hammer, Joshua woke up crying. At that point, the defendant began attacking both Brenda and Joshua with the claw hammer. Brenda tried to defend herself and/or Joshua. Dr. Embry testified that Brenda suffered lacerations to her face, injuries to her shoulder and right side of the body, broken jaw on both sides of the face, and broken left middle and ring fingers with extensive blunt-force injuries to the hands. Both Brenda and Joshua suffered fractured skulls. The defendant told his girlfriend that 'they don't die instantly.' According to Dr. Embry, a person may live longer with a fractured skull because the brain can swell. One autopsy photograph shows Brenda's herniated brain protruding from the skull. In addition to a fractured skull, Joshua suffered lacerations consuming a large area around the right eye. He suffered injuries to both sides of his face, the right side of his neck, and the upper torso. Perhaps in an attempt to ward off the blows, Joshua suffered a 1/4 inch cut to his right little finger. Ultimately Brenda and Joshua died from their injuries but not before each of them experienced intense pain from the savage

beatings. Brenda suffered approximately twenty forceful blows to her head. Joshua suffered approximately sixteen forceful blows to his head. As did Latham, Brenda and Joshua suffered psychologically. Surely, Brenda was horrified when she awoke to see her own brother attacking her with a claw hammer as she lay helpless in her own bed. During the attack, there was sufficient time for Brenda to fear not only for her life but to fear for the life of her three-year-old grandson who was sleeping just inches away. Certainly, Brenda experienced mental suffering and agony upon realizing that her brother intended to kill not only her, but also her grandson and that she was helpless to prevent it. Joshua could not possibly have escaped mental suffering. He was awakened from sleep by the sounds of the attack on his grandmother. When he cried out, he saw his beloved uncle raise a claw hammer to him as well. Certainly, Joshua experienced extreme shock, fright, and horror before his death. The murders of Brenda McCutchin and Joshua Hodges were committed under circumstances that caused fear and pain to them before their deaths. While Brenda and Joshua lay dying or dead in their bed, the defendant left messages in various rooms of the house. He wrote, 'Fuck this God,' 'Fuck this world,' 'I'll be dead too,' 'It's about to pick up,' 'Don't look for me,' 'Tammy I love you Always Never 4-get Baby,' 'Killing is my business,' and 'My whole life I have been ran over. It's stopping now.' Afterward, the defendant retrieved the claw hammer and proceeded to Latham

> McCutchin's house to kill Latham. The court finds that the murders of Brenda McCutchin and Joshua Hodges were conscienceless or pitiless crimes and unnecessarily torturous to the victims. The court finds that the brutality the defendant exhibited to Brenda and to Joshua exceeds that which is normally present in a capital case.
>
> "'The court finds that the State proved beyond a reasonable doubt that each of the murders of the three victims was especially heinous, atrocious or cruel compared to other capital offenses."

(C. 350-53.) The trial court also found that the murders were committed by one act or pursuant to one scheme or course of conduct. Section 13A-5-49(9), Ala.Code 1975. The trial court's sentencing order further reflects that the court also found as an aggravating circumstance in the count charging Brownfield with Latham's death that the murder was committed during the commission of a first-degree burglary. Section 13A-5-49(4), Ala.Code 1975.

The State presented ample evidence indicating that the murders were committed by one act or pursuant to one scheme or course of conduct. Thus, this aggravating circumstance was correctly applied in this case.

Similarly, there was an abundance of evidence indicating that Brownfield went to Latham's residence intending to kill him; thus, there was ample evidence that that murder was committed during the commission of a first-degree burglary. Therefore, this aggravating circumstance was cor-

rectly applied as to the count charging Brownfield with killing Latham.

Finally, for the circumstance that the murders were especially heinous, atrocious, or cruel to exist, the murders must have been unnecessarily torturous to the victims. See *Ex parte Kyzer,* 399 So.2d 330, 334 (Ala.1981). In this determination we must consider whether the violence involved in achieving the killing went beyond what was necessary to cause death, whether the victims experienced appreciable suffering after a swift assault, and whether there was psychological torture. See *Norris v. State,* 793 So.2d 847 (Ala.Crim.App.1999). The evidence supports the above-quoted portion of the trial court's findings that the murders were especially heinous, atrocious, or cruel. Brownfield savagely bludgeoned to death his 47-year-old sister and her 3-year-old grandson as they lay helpless in their bed; both victims awakened upon the first blows, and each suffered defensive wounds among the many wounds sustained during the extended attacks; and Brenda surely suffered knowing that she could not defend either herself or her young grandson as they were being beaten to death, as too did young Joshua, who was awakened from his sleep to the sight of his uncle attacking first his grandmother a few inches from him, and then the attack alternating between him and his grandmother. Similarly, 64-year-old Latham saw the commencement of the attack that killed him in his own home, at the hands of his brother-in-law; that attack lasted for some time as well, and Latham suffered a number of wounds, some defensive. Finally, the evidence indicated that the victims

survived for some period following the commencement of the attacks. We have consistently held that brutal beatings that result in death meet the statutory definition of especially heinous, atrocious, or cruel. See *Brooks v. State*, 695 So.2d 176 (Ala.Crim.App.1996), aff'd, 695 So.2d 184 (1997); *Smith v. State*, 795 So.2d 788 (Ala.Crim.App.2000); *Ashley v. State*, 651 So.2d 1096 (Ala.Crim.App.1994); *McGahee v. State*, 632 So.2d 976 (Ala.Crim.App.), aff'd, 632 So.2d 981 (Ala.1993); *Freeman v. State*, 555 So.2d 196 (Ala.Crim.App.1988). Clearly, there was sufficient evidence from which the jury could conclude that the manner of death in this case was especially heinous, atrocious, or cruel when compared to other capital cases. Thus, this aggravating circumstance was correctly found by both the jury and the circuit court.

The trial court found one statutory mitigating circumstance was present-that Brownfield had no significant history of prior criminal activity. Section 13A-5-51 (1), Ala.Code 1975. The trial court's sentencing order further addressed the evidence of nonstatutory mitigating circumstances that defense counsel had presented:

> "During the penalty phase of the trial, the defendant presented evidence of nonstatutory mitigating circumstances.
>
> "Evidence exists that the defendant, during his childhood, suffered from obesity, was rejected by his peers, and provided the primary care to his ailing parents. During adolescence, the defendant experimented with drugs to gain friendships. From the age of

twenty years to the age of twenty-four years, the defendant made a lot of friends but was regularly abusing drugs. The following years, the defendant's drug use continued to worsen. The court finds that the defendant suffered from a substance dependence disorder that went untreated.

"The defendant presented evidence that he suffers from dysthymic disorder, a mental illness that exists when a person has chronic feelings of sadness and low, self-esteem. The court recognizes that the defendant experienced periods of sadness-and low self-esteem during his life but does not find that these periods were severe or chronic. The evidence shows that the defendant was doted on by his parents and had a relatively happy childhood. During early adulthood, the defendant socialized with his extended family and friends and maintained employment. The defendant was able to function appropriately in society although he did not always choose to do so.

"The defendant presented evidence that he was detrimentally affected by the death of his parents. Surely, the defendant experienced sadness and loss by the death of his parents. The defendant was an adult, however, when his parents died. The court does not find that the defendant was harmed by his parents' deaths.

"The evidence established that the defendant demonstrated the capacity to love and care for another human being during his life. The defendant loved and cared for his elderly par-

> cnts. The evidence further established that the defendant had friends and relatives that cared for him.
>
> "Based on the evidence, the court finds that the defendant is a low risk for future violence in prison and would adapt well to prison environment. The court finds that, once taken into custody, the defendant cooperated with law enforcement and confessed to the crimes. The court further finds that the defendant has expressed remorse for the deaths of the victims."

(C. 359-60.) The circuit court weighed the aggravating circumstances and the mitigating circumstances, considered the jury's recommendation of death, and sentenced Brownfield to death. Contrary to Brownfield's bare assertion on appeal, there is no indication that either the jury's advisory verdict or the trial court's imposition of the death penalty was imposed as a result of passion, prejudice, or some other arbitrary factor.

Pursuant to § 13A-5-53(b)(2), Ala.Code 1975, we must independently weigh the aggravating circumstances and the mitigating circumstances to determine the propriety of Brownfield's sentence of death. Brownfield, in a cold and brutal manner, savagely beat his 47-year-old sister, Brenda, and her 3-year-old grandson, Joshua, to death with a hammer and then wrote assorted comments on the walls and attempted to set fire to the house. He then drove across town to the house where his 64-year-old brother-in-law, Latham, lived, which he entered under the ruse of a friendly visit, before killing Latham by savagely beating him with the

same hammer he had used to kill Brenda and Joshua and stabbing him in the heart with a knife. Further, the evidence indicated that all three victims suffered defensive wounds and that they survived the initial blows and were alive for some period during the attacks. This Court is convinced, after independently weighing the aggravating circumstances and the mitigating circumstances, that death was the appropriate punishment in this case.

Brownfield's sentence was neither disproportionate nor excessive when compared to penalties imposed in similar cases. See *Brooks v. State*, 695 So.2d 176 (Ala.Crim.App.1996), aff'd, 695 So.2d 184 (1997); *Smith v. State*, 795 So.2d 788 (Ala.Crim.App.2000); *Ashley v. State*, 651 So.2d 1096 (Ala.Crim.App.1994); *McGahee v. State*, 632 So.2d 976 (Ala.Crim.App.), aff'd, 632 So.2d 981 (Ala.1993); *Freeman v. State*, 555 So.2d 196 (Ala.Crim.App.1988).

Last, we have searched the record for any error that may have adversely affected Brownfield's substantial rights and have found none. See Rule 45A, Ala.R.App.P.

Brownfield's convictions and sentence to death are due to be, and are hereby, affirmed.

AFFIRMED.

BASCHAB, P.J., and SHAW, WISE, and WELCH, JJ., concur.

No. 1070255

IN THE

Supreme Court of the State of Alabama

JAMES BEN BROWNFIELD,

Petitioner/Appellant,

—v.—

STATE OF ALABAMA,

Respondent/Appellee.

Court of Criminal Appeals Case Number: CR-04-0743

ON APPEAL FROM JACKSON COUNTY CIRCUIT COURT
CC-02-99, CC-02-100 AND CC-02-101

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April 6, 2009

Brownfield to use one of his peremptory strikes to remove Webster from the jury venire, and the case should therefore be reversed and remanded for a new trial.

III.

THIS COURT SHOULD REVERSE THE DECISION OF THE COURT OF CRIMINAL APPEALS BECAUSE THE TRIAL COURT ERRED IN NOT FINDING THAT THE SENTENCE OF DEATH IS INAPPROPRIATE IN MAKING ITS MANDATED INDEPENDENT WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

This Court should determine that death was not the proper sentence in this case.

There are several significant factors in favor of such leniency. First, at the time of the crime, Brownfield was a 27-year-old with no significant history of prior criminal activity. Brownfield expressed remorse for the deaths of the victims. The trial court even found that Brownfield would be a low risk for future violence in prison and would adapt well to the prison environment. The trial court also found that Brownfield had the capacity to love and care for other human beings, but found that he suffered from dysthymic disorder and a substance dependence disorder. The trial court further found that Brownfield was under the influence of methamphetamine and Xanax either prior to or during the offenses.

Therefore, if the Court declines to reverse Brownfield's conviction and the judgment of the Court of Appeals, it should set the sentence of death aside and remand to the trial court with directions that Brownfield be sentenced to life imprisonment without parole, pursuant to Ala. Code §13A-5- 53(d) (3).

IV.

THIS COURT SHOULD REVERSE THE DECISION OF THE COURT OF CRIMINAL APPEALS BECAUSE THE LOWER COURT ERRED IN NOT FINDING FINDING THAT ALABAMA'S STATUTORY SCHEME FOR IMPOSING THE DEATH PENALTY VIOLATES THE RIGHT OF THE APPELLANT TO A JURY DETERMINATION OF WHETHER AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES

In accordance with recent rulings in *Ring v. Arizona*, 536 U.S. 584 (2002), and other similar cases, it is appropriate, and further, it is constitutional, for aggravating circumstances to be found by the jury by a reasonable doubt. In his concurring opinion to *Ring*, Justice Scalia stated that the "fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives must be found by the jury by a reasonable doubt." 122 S. Ct. at 2445. Furthermore, the advisory sentencing verdict returned by the jury in this case was a vote of 11-1 in favor of

death. (R. 2303). This Court said in its opinion that "the jury unanimously found at least one statutory aggravating circumstance, making Brownfield eligible for the death penalty." (Opinion*79). However, because one juror voted against death in the sentencing phase, it is possible that such vote was cast because he or she did not find an aggravating circumstance that would make the Appellant eligible for death, or because that juror determined that mitigating circumstances present outweighed any aggravating circumstance. Therefore, the jury was not unanimous as required under Rule 23.1(a) of the Alabama Rules of Criminal Procedure. Although this Court routinely upholds death sentences imposed after nonunanimous jury recommendations, the Appellant maintains that to do so is violative of the U.S. Supreme Court's holding in *Ring*, and of his Sixth Amendment Constitutional rights. This Court erroneously found that the jury should not decide what relative weight to assign the aggravating and mitigating circumstances.

V

THIS COURT SHOULD REVERSE THE DECISION OF THE COURT OF CRIMINAL APPEALS BECAUSE IT ERRED IN NOT FINDING THAT THE SENTENCE OF DEATH WAS IMPOSED PURSUANT TO PASSION, PREJUDICE, OR SOME ARBITRARY FACTOR

This court should determine that the sentence of death was imposed pursuant to passion, prejudice,

or some arbitrary factor. The combined offenses were tragic. Clearly, a jury would be especially susceptible to passion, prejudice or some other arbitrary factor. Scottsboro is an idyllic community nestled by the Tennessee River in rural Jackson County. Here, the jury recommended death pursuant to passion, prejudice or other similar factors. Thus, the Court should, at a minimum, remand this case with instructions to sentence the Defendant to life without the possibility of parole pursuant to Ala. Code § 13A-5-53(d) (3).

VI

THIS COURT SHOULD REVERSE THE DECISION OF THE COURT OF CRIMINAL APPEALS BECAUSE THE TRIAL COURT ERRED IN NOT FINDING THAT THE SENTENCE OF DEATH IS EXCESSIVE OR DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES

This court should determine that the sentence imposed is excessive or disproportionate to the penalty imposed in similar cases, considering Brownfield and his crime. A review of cases similar to this shows that the sentence of death here is indeed disproportionate.

IN THE

Alabama Court of Criminal Appeals

CASE NUMBER 04-0743

JAMES BEN BROWNFIELD,

Appellant,

—v.—

STATE OF ALABAMA,

Appellee.

FILED Jun 2, 2005
Clerk
ALA Court
Criminal Appeals

ON APPEAL FROM CIRCUIT COURT OF JACKSON COUNTY
HON. JENIFER C. HOLT, JUDGE
CASES NUMBER CC-02-99, 100, 101
DEATH PENALTY

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ORAL ARGUMENT REQUESTED

ARGUMENT

I

ALABAMA'S STATUTORY SCHEME FOR IMPOSING THE DEATH PENALTY VIOLATES THE RIGHT OF THE APPELLANT TO A JURY DETERMINATION OF WHETHER AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES, AND THEREBY DEPRIVED THE APPELLANT OF HISRIGHT TO A JURY TRIAL ON THE SENTENCE OF DEATH

In Alabama, the legislature has adopted a scheme for the imposition of the death penalty wherein the final determination is made by the trial judge. Ala. Code § 13A-5- 47. Prior to the trial judge's determination of a sentence, a defendant is allowed a jury hearing, which renders an "advisory verdict " to the trial judge. Ala. Code § 13A-5-46.

This Court has held that the advisory nature of a jury in the sentencing phase does not violate the right to a jury trial established by Ala. Const., Art. I § 11.[1] *Edwards v. State*, 515 So.2d 86 (Ala.Crim.App. 1987). However, in making that determination, this Court underscored the advisory-only nature of the jury's role:

> Contrary to appellant's argument, the death penalty is not invoked on the basis of the jury's recommendation. ***The jury's role in sentencing under our bifurcated trial process is merely advisory in nature,*** 515 So.2d at 9.

[1] "[We declare] . . . that the right of trial by jury shall remain inviolate."

The Alabama Supreme Court has held that it is necessary, under Alabama's statutory scheme, that the trial judge must determine that at least one of the aggravating circumstances enumerated in Ala. Code § 13A-5-49 exists in order to impose a death sentence: "The whole catalog of aggravating circumstances must outweigh mitigating circumstances before a trial court may opt to impose the death penalty by overriding the jury's recommendation." *Ex parte Jones,* 456 So.2d 380, 382 (Ala. 1984). If there is no aggravating circumstance, then, by necessity, the aggravating circumstances cannot outweigh the mitigating circumstances.

This Court has further held that, in addition to the finding of at least one aggravating circumstance, the trial judge (and this Court, *de novo* on appeal pursuant to Ala. Code § 13A-5-53) must find that the aggravating circumstances outweigh the mitigating circumstances to impose the death penalty:

> In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist . . . Ala. Code § 13A-5-47 (e); *see, Stallworth v. State*, 868 So.2d 1128 (Ala.Crim.App. 2001).

Into this statutory scheme has burst the landmark ruling of the United States Supreme Court in the case of *Ring v. Arizona*, 122 S.Ct. 2428 (2002). Earlier, the Supreme Court, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), had ruled that the jury trial right of the U.S. Constitution, Amendment VI, required that a defendant not be

"expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. at 483. However, the Supreme Court, in *Walton* v. *Arizona*, 497 U.S. 639 (1990), had previously ruled that there was no Sixth Amendment Jury Clause violation in the Arizona regime.

Under the Arizona regime, the jury made the initial determination of guilt, and then went home. The trial judge then conducted the sentencing phase, and made a determination of the existence *vel non* of an aggravating circumstance. Upon finding one or more aggravating circumstances, the trial judge then weighed those aggravating circumstances against any mitigating circumstances:

> In determining whether to impose a sentence of death or life imprisonment, the court shall take into account the aggravating and mitigating circumstances included in subsections G and H of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection G of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency Ariz.Rev.Stat. § 13-703F.

In *Ring*, the Supreme Court overruled *Walton*, and held that the right to a jury trial required that the jury make the determination of the existence of an aggravating circumstance in the Arizona statutory scheme.

> For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our

> Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U.S., at 647-49, 110 S.Ct. 3047. Because Arizona's enumerated aggravating factors operate as the "functional equivalent of an element of a greater offense," *Apprendi,* 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury. 122 S.Ct. at 2443.

Justice Scalia, in his concurring opinion, correctly stated that:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury by a reasonable doubt. 122 S.Ct. at 2445.

There are only two differences between the Arizona and Alabama statutory schemes. The first is that Alabama interposes the purely advisory jury recommendation. The second is that Arizona's statute, by referring to mitigating circumstances as "leniency," seems to place something of a burden of persuasion, if not of proof, on the defendant. For purposes of this case, each of these is a

"distinction without a difference," Henry Fielding, *Tom Jones*, Bk. VI, Ch. 13.

The death sentence in this case is not "saved" by the fact that the jury convicted the defendant of capital murder, thereby making an implied finding that the murders were committed pursuant to one scheme or course of conduct, and/or in the course of a burglary. For example, the State may argue that the conviction on the count involving burglary, made capital by Ala. Code 13A-5-40(a)(4), also constitutes a finding of a burglary aggravating circumstance under Ala. Code § 13A-5-49(4). However, the ultimate sentencing decision is required to be based not on the existence *vel non* of one or more aggravating circumstances, but on the finding that those aggravating circumstances outweigh the mitigating circumstances. On such an outweighing, or even on the existence of *vel non* mitigating circumstances, the guilt phase verdict is silent.

Nor will it "save" the sentence in this case that the jury voted 11-1 in favor of a death sentence (R.332-34). Criminal jury verdicts in Alabama are required to be unanimous under Ala.R.Crim. P. 23.1(a):

> (a) Form of Verdict. The verdict of the jury shall be unanimous, shall be in writing, signed by the foreman, and shall be returned in open court.

As the official comment to this portion of the Rule further states: "Rule 23. 11 (a) provides that the jury's verdict must be unanimous. Alabama case law clearly states that this is a fundamental requisite of a jury. *Baader* v. *State*, 201 Ala 76,

77 So. 370 (1917); *Dixon v. State*, 27 Ala.App. 64, 167 So. 340 (1936)."

Thus, one member of the jury either determined that the mitigating circumstances outweighed the aggravating circumstances under Ala.Code § 13A-5-46, or that there were no aggravating circumstances. Therefore, the requirement that a criminal jury be unanimous under the Rule and Ala. Const. Art. I § 11, was not satisfied. With *Ring*, Ala.R.Crim. P. 23.1(a), and the established jurisprudence of Ala. Const. Art. I § 11 taken together, it is clear that the jury vote in the sentencing phase of the Appellant's trial does not support the sentence of death.

It is also clear that the Appellant is entitled to have *Ring* applied to the holding in this appeal. As the United States Supreme Court held in *Griffith v. Kentucky*, 479 U.S. 314 (1987):

> We therefore hold that a new rule for the conduct of all criminal prosecution s is t be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break " with the past. 479 U.S. at 328.

The Appellant filed a Motion for New Trial in his death penalty case on November 22, 2004. (C. 991). That Motion specifically alleges that the sentences in this case are contrary to the law. (*Id.* ¶ 5). The Motion for New Trial specifically invoked the rights of the Appellant under U.S. Const., Amend. VI, and Ala. Const., Art, I § 11 to a trial by raised before the trial court, and the denial by lapse of

time of the new trial motion under Ala.R.Crim. P. 24.4 preserved this issue for appeal.[2]

However, even if the Court was to hold the Appellant to the strict standard of plain error under Ala.R.App.P. 45A, that standard is clearly met:

> In all cases in which the death penalty has been imposed, the court of criminal appeals **shall** notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant.[3]

The Alabama Supreme Court made the mandatory nature of this review clear in *Ex parte Carroll*, 627 So.2d 874 (Ala. 1993):

> In reviewing a death penalty case, this Court ***will*** notice any plain error or defect in the proceeding under review, regardless of whether it was brought to the attention of the trial court. This Court ***will*** take appropriate appellate action whenever the error "has ***or probably has*** adversely affected the substantial right of the appellant." 627 So.2d at 875 (citations omitted, emphasis added).

The denial of the right to have a jury determine that aggravating circumstances outweighed mitigating circumstances was clearly violated in this case. Therefore, the Appellant' death sentence is

due to be vacated and the lesser sentence of life imprisonment without parole imposed. This is the construction given the similar provisions of N.J. Rev. Stat. § 2C: 11-3 in the case of *State v. Hunt*, 115 N.J. 330, 558 A.2d 1259 (1989):

> In a capital case, unlike the ordinary criminal prosecution, jurors need not reach a unanimous verdict (for life without parole]. Thus, a decision not to agree is a legally acceptable outcome, which results not in a mistrial, but in a final verdict. For this reason, trial courts should not charge juries in the penalty phase on the importance of reaching a unanimous verdict. *Ibid.* ***As long as one juror believes that the aggravating factors do not outweigh the mitigating factors, the jury must not impose the death penalty.*** 558 A.2d at 1286 (citations omitted, emphasis added).

This is also the interpretation given the similar Georgia statute, Ga. Code Ann. X17-10-30 (b) (7):

> [I]n a murder case, after conviction, where only two sentences can be imposed, life imprisonment o r death, ***if the convicting jury is unable to agree on which of those two sentences to impose, the trial judge must impose the lesser, life imprisonment.*** *Hill v. State*, 250 Ga. 821, 301 S.E.2d 269, 270 (1983) (emphasis added).

In the alternative, the cause should be remanded for retrial on the sentence.

IV

THIS COURT SHOULD FIND THAT THE SENTENCE OF DEATH WAS IMPOSED PURSUANT TO PASSION, PREJUDICE, OR SOME ARBITRARY FACTOR

This court is mandated by Ala. Code § 13A-5-53 (b) (1) to determine whether the sentence of death was imposed pursuant to passion, prejudice, or some arbitrary factor. The combined offenses were tragic. Clearly, a jury would be especially susceptible to passion, prejudice or some other arbitrary-factor. Scottsboro is an idyllic community nestled by the Tennessee River in rural Jackson County. Here, the jury recommended death pursuant to passion, prejudice or other similar factors. Thus, the Court should, at a minimum, remand this case with instructions to sentence the Defendant to life without the possibility of parole pursuant to Ala. Code § 13A-5-53(d)(3).

Number 60

INDICTMENT

THE STATE OF ALABAMA CIRCUIT COURT
JACKSON COUNTY SPRING TERM 2002

STATE OF ALABAMA vs. James Ben Brownfield, Jr.

The Grand Jury of Said County charge that before the finding of this indictment, James Ben Brownfield Jr., Whose name(s) to the Grand Jury is/are otherwise unknown than as stated did knowingly and unlawfully enter or remain unlawfully in a dwelling, to-wit: the residence of Latham Durwood McCutchin, with the intent to commit a crime therein; to-wit: Murder, and in effecting entry or while in the dwelling or in immediate flight therefrom did use a dangerous instrument in violation of Section 13A-7-5 of the Code of Alabama, and in the course of committing said burglary did intentionally cause the death of Latham Durwood McCutchin, by hitting him in the head with a hammer, in violation of Section 13A-5-40 (a) (4) of the Code of Alabama, subsequent to the passage of said Section 13A of the Code of Alabama, contrary to law, and against the peace and dignity of the people of the State of Alabama.

/s/ CHARLES R. RHODES
CHARLES R. RHODES
Disrict Attorney of the Thirty-Eight Judicial Circuit

Charge: Capital Murder

A TRUE BILL

/s/ _____
Foreperson of this Grand Jury

Filed in open court the _____ day of MAR 21, 2002.

/s/ KEN FERRELL
Ken Ferrell, Circuit Clerk

Number 61

INDICTMENT

THE STATE OF ALABAMA CIRCUIT COURT
JACKSON COUNTY SPRING TERM 2002

STATE OF ALABAMA vs. James Ben Brownfield, Jr.

The Grand Jury of Said County charge that before the finding of this indictment, James Ben Brownfield Jr., Whose name(s) to the Grand Jury is/are otherwise unknown than as stated, by one act or pursuant to one scheme or course of conduct, did intentionally cause the death of Brenda Whitehead McCutchin by hitting her in the head with a hammer, and did intentionally cause the death of Joshua Dewayne Hodges by hitting him in the head with a hamer, and did intentionally cause the death of Latham Durwood McCutchin by hitting him in the head with a hammer, in violation of Section 13A-5-40 (a) (4)(10) of the Code of Alabama, subsequent to the passage of said Section 13A of the Code of Alabama, contrary to law, and against the peace and dignity of the people of the State of Alabama.

/s/ CHARLES R. RHODES
CHARLES R. RHODES
Disrict Attorney of the Thirty-Eight Judicial Circuit

Charge: Capital Murder

A TRUE BILL

/s/_____
Foreperson of this Grand Jury

Filed in open court the _____day of MAR 21, 2002.

/s/ KEN FERRELL
Ken Ferrell, Circuit Clerk

Number 62

INDICTMENT

THE STATE OF ALABAMA CIRCUIT COURT
JACKSON COUNTY SPRING TERM 2002

STATE OF ALABAMA vs. James Ben Brownfield, Jr.

The Grand Jury of Said County charge that before the finding of this indictment, James Ben Brownfield Jr., Whose name(s) to the Grand Jury is/are otherwise unknown than as stated, did intentionally cause the death of Joshua Dewayne Hodges, by hitting him in the head with a hammer, when Joshua Dewayne Hodges was less than 14 years of age, in violation of Section 13A-005-040 (a) (15) of the Code of Alabama, subsequent to the passage of said Section 13A of the Code of Alabama, contrary to law, and against the peace and dignity of the people of the State of Alabama.

/s/ CHARLES R. RHODES
CHARLES R. RHODES
Disrict Attorney of the Thirty-Eight Judicial Circuit

Charge: Capital Murder

A TRUE BILL

/s/ _____
Foreperson of this Grand Jury

Filed in open court the _____day of MAR 21, 2002.

/s/ KEN FERRELL
Ken Ferrell, Circuit Clerk

Case No. CC-02-99

STATE OF ALABAMA,

—vs.—

JAMES BEN BROWNFIELD, JR.

JURY VERDICT

We, the jury, find the defendant, James Ben Brownfield, Jr., guilty of the offense of capital murder as charged in the indictment.

/s/ Wanda Atchley
Foreperson

Case No. CC-02-100

STATE OF ALABAMA,

—VS.—

JAMES BEN BROWNFIELD, JR.

JURY VERDICT

We, the jury, find the defendant, James Ben Brownfield, Jr., guilty of the offense of capital murder as charged in the indictment.

/s/ Wanda Atchley
Foreperson

Case No. CC-02-101

STATE OF ALABAMA,

—vs.—

JAMES BEN BROWNFIELD, JR.

JURY VERDICT

We, the jury, find the defendant, James Ben Brownfield, Jr., guilty of the offense of capital murder as charged in the indictment.

/s/ Wanda Atchley
Foreperson

Case No. CC-02-99

STATE OF ALABAMA,

—vs.—

JAMES BEN BROWNFIELD, JR.

JURY VERDICT

We, the jury, recommend that the defendant, James Ben Brownfield, Jr., be punished by death. The vote is as follows:

__11__ Death __1__ Life without Parole

/s/ Wanda Atchley
Foreperson

Case No. CC-02-100

STATE OF ALABAMA,

—vs.—

JAMES BEN BROWNFIELD, JR.

JURY VERDICT

We, the jury, recommend that the defendant, James Ben Brownfield, Jr., be punished by death. The vote is as follows:

__11__ Death __1__ Life without Parole

/s/ Wanda Atchley
Foreperson

Case No. CC-02-99

STATE OF ALABAMA,

—vs.—

JAMES BEN BROWNFIELD, JR.

JURY VERDICT

We, the jury, recommend that the defendant, James Ben Brownfield, Jr., be punished by death. The vote is as follows:

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/s/ Wanda Atchley
Foreperson

Case No. CC-02-101

STATE OF ALABAMA,

—vs.—

JAMES BEN BROWNFIELD, JR.

JURY VERDICT

We, the jury, recommend that the defendant, James Ben Brownfield, Jr., be punished by death. The vote is as follows:

__11__ Death __1__ Life without Parole

/s/ Wanda Atchley
Foreperson

STATE OF ALABAMA, JACKSON COUNTY
IN THE CIRCUIT COURT

Case No.: CC-02-99

STATE OF ALABAMA,

Plaintiff

v.

JAMES BEN BROWNFIELD, JR.,

Defendant

ORDER

On February 9, 2004, the defendant appeared in open court with counsel, Richard Fricks and Gary Hartline, for the trial of this case.

The case proceeded to trial and a jury of fourteen (14) men and women duly empaneled and sworn as required by law heard the evidence in the case. After hearing the evidence and being charged as to the applicable law and upon consideration of the law and the evidence and the number of the jury being reduced by two (2) as

provided by law, the jury returned the following verdict on February 25, 2004:

"We, the jury, find the defendant, James Ben Brownfield, Jr., guilty of the offense of capital murder as charged in the indictment." The Jury Verdict was signed by Wanda Atchley, as foreperson.

The jury was polled and the verdict was unaminous in finding the defendant guilty of capital murder.

Subsequent to the jury finding the defendant guilty of the capital offense, the court commenced a sentence hearing before the said jury as required by Section 13A-5-45 of the Alabama Death Penalty Statute. After hearing the evidence and being charged as to the applicable law and upon consideration of the law and the evidence, the jury returned the following advisory Jury Verdict on February 26, 2004:

"We, the jury, recommend that the defendant, James Ben Brownfield, Jr., be punished by death. The vote is as follows:

__11__ Death __1__ Life without Parole

The Jury Verdict was signed by Wanda Atchley, as foreperson.

The defendant is incarcerated in the Jackson County Jail this date and shall remain incarcerated pending sentencing hearing. Jackson County Probation Officer, Mike Williamson, is directed to conduct an investigation and prepare a written pre-sentence investigation report for the court with copies to the District Attorney and counsel for the defendant. The sentencing hearing shall be held April 29, 2004, at 1:15 P.M.

Done this 2nd day of March, 2004.

/s/ Jenifer C. Holt
JENIFER C. HOLT
Circuit Judge

STATE OF ALABAMA, JACKSON COUNTY
IN THE CIRCUIT COURT

Case No.: CC-02-100

STATE OF ALABAMA,

Plaintiff

—v.—

JAMES BEN BROWNFIELD, JR.,

Defendant

ORDER

On February 9, 2004, the defendant appeared in open court with counsel, Richard Fricks and Gary Hartline, for the trial of this case.

The case proceeded to trial and a jury of fourteen (14) men and women duly empaneled and sworn as required by law heard the evidence in the case. After hearing the evidence and being charged as to the applicable law and upon consideration of the law and the evidence and the number of the jury being reduced by two (2) as

provided by law, the jury returned the following verdict on February 26, 2004:

"We, the jury, find the defendant, James Ben Brownfield, Jr., guilty of the offense of capital murder as charged in the indiement." The Jury Verdict was signed by Wanda Atchley, as foreperson.

The jury was polled and the verdict was unanimous in finding the defendant guilty of capital murder.

Subsequent to the jury finding the defendant guilt of the capital offense, the court commenced a sentence hearing before the said jury as required by Secion 13A-4-45 of the Alabama Deat Penalty Statue. After hearing the evidence and being charged as to the applicable law and upon consideration of the law and the evidence, the jury returned the following advisory Jury Verdict on February 26, 2004:

"We, the jury, find the defendant, James Ben Brownfield, Jr., be punished by death. The vote is as follows:

__11__ Death __1__ Life without Parole

The Jury Verdict was signed by Wanda Atchley, as foreperson.

The defendant is incarcerated in the Jackson County Jail this date and shall remain incarcerated pending sentencing hearing. Jackson County Probation Officer, Mike Williamson, is directed to conduct an investigation and prepare a written pre-sentence investigation report for the court with copies to the District Attorney and counsel for the defendant. The sentencing hearing shall be held April 29, 2004, at 1:15 P.M.

Done this 2nd day of March, 2004.

/s/ Jenifer C. Holt
JENIFER C. HOLT
Circuit Judge

STATE OF ALABAMA, JACKSON COUNTY
IN THE CIRCUIT COURT

Case No.: CC-02-101

STATE OF ALABAMA,

Plaintiff

—v.—

JAMES BEN BROWNFIELD, JR.,

Defendant

ORDER

On February 9, 2004, the defendant appeared in open court with counsel, Richard Fricks and Gary Hartline, for the trial of this case.

The case proceeded to trial and a jury of fourteen (14) men and women duly empaneled and sworn as required by law heard the evidence in the case. After hearing the evidence and being charged as to the applicable law and upon consideration of the law and the evidence and the number of the jury being reduced by two (2) as

provided by law, the jury returned the following verdict on February 26, 2004:

"We, the jury, find the defendant, James Ben Brownfield, Jr., guilty of the offense of capital murder as charged in the indicment." The Jury Verdict was signed by Wanda Atchley, as foreperson.

The jury was polled and the verdict was unanimous in finding the defendant guilty of capital murder.

Subsequent to the jury finding the defendant guilt of the capital offense, the court commenced a sentence hearing before the said jury as required by Secion 13A-4-45 of the Alabama Deat Penalty Statue. After hearing the evidence and being charged as to the applicable law and upon consideration of the law and the evidence, the jury returned the following advisory Jury Verdict on February 26, 2004:

"We, the jury, find the defendant, James Ben Brownfield, Jr., be punished by death. The vote is as follows:

__11__ Death __1__ Life without Parole

The Jury Verdict was signed by Wanda Atchley, as foreperson.

The defendant is incarcerated in the Jackson County Jail this date and shall remain incarcerated pending sentencing hearing. Jackson County Probation Officer, Mike Williamson, is directed to conduct an investigation and prepare a written pre-sentence investigation report for the court with copies to the District Attorney and counsel for the defendant. The sentencing hearing shall be held April 29, 2004, at 1:15 P.M.

Done this 2nd day of March, 2004.

/s/ Jenifer C. Holt
JENIFER C. HOLT
Circuit Judge

STATE OF ALABAMA, JACKSON COUNTY
IN THE CIRCUIT COURT

Case No.: CC-02-101, CC-02-99, CC-02-100

STATE OF ALABAMA,

Plaintiff

—v.—

JAMES BEN BROWNFIELD, JR,

Defendant

ORDER

The defendant, James Ben Brownfield, Jr., appears in open court on April 29, 2004, with counsel, Richard Fricks and Gary Hartline, for a sentencing hearing.

The defendant, James Ben Brownfield, Jr., was charged by indictments of the Grand Jury of Jackson County with three offenses of capital murder. In case number CC-02-99 the indictment charges the defendant with the capital offense of the murder of Latham Durwood McCutchin during a burglary in the first degree. In case number CC-02-100, the indictment charges the defen-

dant with the capital offense of the murder of Latham Durwood McCutchin, Brenda Whitehead McCutchin, and Joshua Dewayne Hodges wherein two or more persons are murdered pursuant to one act or pursuant to one scheme or course of conduct. In case number CC-02-101, the indictment charges the defendant with the capital offense of the murder of Joshua Dewayne Hodges when Joshua Dewayne Hodges was less than fourteen (14) years of age. The three cases were consolidated for trial.

On February 9, 2004, the defendant appeared in open court with counsel, Richard Fricks and Gary Hartline, for the trial of this case. The case proceeded to trial and a jury of fourteen (14) men and women duly impaneled and sworn as required by law heard the evidence in the case. After hearing the evidence and being charged as to the applicable law and upon consideration of the law and the evidence and the number of the jury being reduced by two (2) as provided by law, the jury returned a verdict on February 25, 2004 of guilty of the offense of capital murder in each case. The jury was polled and the verdict in each case was unanimous in finding the defendant guilty of capital murder.

Subsequent to the jury finding the defendant guilty of the capital offenses, the court commenced a sentence hearing before the said jury as required by Section 13A-5-45 of the Alabama Death Penalty Statute. After hearing the evidence and being charged as to the applicable law and upon consideration of the law and the evidence, the jury returned an advisory verdict on February 26, 2004 recommending that the defen-

dant be punished by death. The vote was eleven (11) for death and one (1) for life imprisonment without parole. The jury was polled and the advisory verdict in each case was unanimous in recommending by a vote of eleven (11) to (1) that the defendant be punished by death.

A pre-sentence investigation report was ordered and sentencing was set for hearing on April 29, 2004.

In keeping with the jury verdict, the court hereby adjudges the defendant guilty of three offenses of capital murder as charged in cases numbered CC-02-99, CC-02-100, and CC-02-101.

The pre-sentence investigation report has been made available to the parties The report is marked as Court's Exhibit A and made a part of the record. The State of Alabama presented no additional evidence at the sentencing hearing nor did the defendant. The attorneys were allowed to be heard in argument as to the sentence to be imposed and as to the aggravating and mitigating circumstances. Following argument, the court asked the defendant if he had anything to say in his own behalf before sentencing. The defendant said nothing.

SUMMARY OF THE CRIME AND THE DEFENDANT'S PARTICIPATION IN IT

At some time in the late evening hours of December 23, 2001, or the early morning hours of December 24, 2001, Brenda Whitehead McCutchin, Joshua Dewayne Hodges, and Latham Durwood McCutchin, were murdered in their homes in Scottsboro, Alabama At the time of their

deaths, Brenda was forty-seven years old Joshua was three years old and Latham was sixty-four years old.

After consuming Xanax pills on the night of December 23, 2001 the twenty-seven year old defendant, James Ben Brownfield, Jr., became enraged with his sister, Brenda Whitehead McCutchin, over drugs and money. While Brenda and her grandson Joshua Dewayne Hodges, were sleeping in their bed, the defendant decided to kill his sister and her estranged husband, Latham Durwood McCutchin. The defendant took a claw hammer into the room where Brenda and Joshua were sleeping and hit Brenda with it. When the defendant hit Brenda, Joshua awoke crying. At that time, the defendant began hitting both Brenda and Joshua with the claw hammer. Brenda suffered approximately twenty forceful blows to the head and other injuries to her body. Joshua suffered approximately sixteen blows to the head and other injuries to his body. Both Brenda and Joshua died from multiple blunt-force injuries. Before he left Brenda's house, the defendant attempted to bum the house with kerosene and a cigarette.

After killing Brenda and Joshua, the defendant took the claw hammer and a set of clean clothes and drove across town to the residence of his brother-in-law, Latham Durwood McCutchin. The defendant initially pretended a friendly visit with Latham but later inside the residence, the defendant informed Latham that he was going to kill him. The defendant and Latham struggled for the claw hammer with the defendant subduing Latham by hitting him with his fists and the

hammer. Latham suffered numerous injuries. He suffered at least ten forceful blows to the head with the claw hammer, bruising to the lower chest, arms, and hands, fractured ribs and a fractured vertebra. Later, the defendant stabbed Latham in the heart and cut his throat with a knife. Latham died from multiple blunt-force injuries. After killing Latham, the defendant showered and dressed in the clean clothes. He gathered the soiled clothes, claw hammer, and knife and placed them in a garbage bag that he found at Latham's house.

The defendant left Latham's house and went to a Christmas party where he saw friends and acquaintances. He told his friend, Nick Logan, that he was moving to Tennessee because he and Brenda had argued and she had kicked him out of the house. Later, the defendant left the party and drove toward Tennessee to Stevenson, Alabama. He placed the garbage bag of evidence in a dumpster in Stevenson and drove back to Scottsboro. The defendant had contact with friends throughout the day of December 24, 2001. The night of December 24, 2001, the defendant went to Tammy Farmer's apartment. During conversations with Tammy, his girlfriend, the defendant confessed to the murders of Brenda, Joshua, and Latham.

Concerned about his father, Rodney McCutchin traveled to Latham McCutchin's house. Rodney and his son found the body of Latham and called 911. The Scottsboro Police Department immediately began an investigation into the death of Latham. During the investigation, they obtained information that implicated Brenda McCutchin and her brother, the defendant, James Ben

Brownfield, Jr. On the morning of December 25, 2001, the Scottsboro Police Department obtained a search warrant to search the home of Brenda McCutchin. Upon searching the home, the police discovered the bodies of Brenda and her grandson, Joshua. The Scottsboro Police Department intensified their search for Brenda's car and the defendant.

At approximately 10:00 A.M. on December 25, 2001, the Scottsboro Police Department located Brenda's car and the defendant at the apartment of defendant's girlfriend, Tammy Farmer. The defendant was apprehended and transported to the Scottsboro Police Department. On December 25 and 26, 2001, the defendant gave Investigators Robert Petty and Doug Hood of the Scottsboro Police Department a statement of confession to the murders.

Additional facts are included, as necessary, throughout this order.

Based upon the evidence presented at trial, the evidence presented during the sentencing hearing, and the pre-sentence investigation report and the evidence submitted in connection with it, the court makes the following findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, each mitigating circumstance enumerated in Section 13A-5-51, and the additional mitigating circumstances offered pursuant to Section 13A-5-52.

AGGRAVATING CIRCUMSTANCES

The court finds that aggravating circumstance number 1 under § 13A-5-49 does not apply. The

capital offenses were not committed by a person under sentence of imprisonment.

The court finds that aggravating circumstance number 2 under §13A-5-49 does not apply. The defendant was not previously convicted of another capital offense or a felony involving the use or threat of violence to the person.

The court finds that aggravating circumstance number 3 under §13A-5-49 does not apply. The defendant did not knowingly create a great risk of death to many persons.

The court finds that aggravating circumstance number 4 under §13 A-5-49 does apply in case number CC-02-99 but does not apply in case number CC-02-100 and case number CC-02-101. The jury, by its verdict, found that the defendant committed the capital offense of the murder of Latham Durwood McCutchin while in the commission of a burglary in the first degree. After killing his sister and nephew at his Wallace Lane residence, the defendant traveled across town to the residence of his brother-in-law, Latham Durwood McCutchin. The defendant told investigators that he went to Latham's house to kill him. The defendant used the same claw hammer to kill Latham that he had used to kill his sister and nephew. When Latham answered the door, the defendant pretended a friendly visit hiding the claw hammer in his jacket. Minutes after being invited into Latham's home, the defendant pulled the claw hammer from his jacket and proceeded to strike Latham. He hit Latham repeatedly with his fists and with the claw hammer. Latham struggled with the defendant as evidenced by the defensive wounds to his hands. According to Dr. Joseph Embry, the State's

medical examiner, Latham suffered bruising to his forearm and hands. Latham suffered at least ten blows to the head, fractured ribs, and a fractured vertebra. Latham didn't die instantly. According to Dr. Embry, the bleeding around the left kidney and blood in the bladder indicates that Latham survived for a period of time. Based on the evidence, this court concurs with the jury's finding. The court finds that the State proved beyond a reasonable doubt that the defendant committed the capital offense of murder of Latham Durwood McCutchin during the commission of a burglary in the first degree.

The court finds that aggravating circumstance number 5 under §13 A-5-49 does not apply. The capital offenses were not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The court finds that aggravating circumstance number 6 under §13A-5-49 does not apply. The capital offenses were not committed for pecuniary gain.

The court finds that aggravating circumstance number 7 under §13 A-5-49 does not apply. The capital offenses were not committed to dismpt or hinder the lawful exercise of any government function or the enforcement of laws.

The court finds that aggravating circumstance number 8 under §13A-5-49 does apply. Each capital offense was especially heinous, atrocious, or cruel compared to other capital offenses.

Under the pretext of a friendly visit, the defendant was allowed into Latham McCutchin's home. Rather than a friendly visit, the defendant's sole purpose of gaining entry into the home was to kill

Latham McCutchin. Minutes after being invited into Latham's home, the defendant informed Latham that he was going to kill him. Immediately, Latham tried to defend himself from the defendant. He saw the defendant pull the claw hammer from his jacket and grabbed at it. During the struggle for the claw hammer, the defendant elbowed Latham and punched him several times with his fists. Dr. Embry testified that he observed a 6½ inch by ½ inch rib bruise on Latham s lower chest. After punching Latham with his fists, the defendant began to hit Latham repeatedly with the claw hammer. Latham suffered at least ten forceful blows to the head. He had numerous lacerations to his head and fractures on his skull. Dr. Embry described the lacerations as blunt-force injuries to the scalp. He said some injuries extended all the way to the bone and the bone was driven into the brain or displaced. He described one 3 inch by 3 inch section of bone missing from Latham's head. Latham suffered defensive wounds to his arms and hands in an attempt to ward off the defendant's blows. According to Dr. Embry, Latham suffered bruising to his forearm and hands. Latham also suffered fractured ribs and a fractured vertebra. Latham didn't die instantly. According to Dr. Embry, the bleeding around the left kidney and blood in the bladder indicates that Latham survived for a period of time. The defendant stabbed Latham in the heart with a knife leaving a 1¼ inch wound over the heart and extending into it. The defendant cut Latham's throat with the knife from one side of his neck to the other. The defendant told investigators that he stabbed Latham in the chest

and cut his throat because he kept breathing and making noises. He also told his girlfriend that "they don't die instantly". Clearly, Latham McCutchin suffered intense pain for a significant period of time prior to his death. Additionally, Latham McCutchin suffered psychologically. The court can only imagine the intense fear that Latham must have felt when his brother-in-law told him that he was going to kill him. Latham was trapped in his own home having been awakened from sleep for the night. Latham had no weapon to defend himself against the much younger and stronger defendant. He saw the defendant pull the claw hammer from his jacket and was helpless to prevent the attack on his life. The murder of Latham McCutchin was committed under circumstances that caused fear and pain to Latham before his death. Furthermore, while Latham lay dying or dead in his living room floor, the defendant wrote a message on a wall in the house. He wrote, "This was necessary Ben. I'm sorry for your family. They deserved it." Afterward, the defendant showered in the victim's bathroom, gathered his blood-soiled clothes, the claw hammer, and knife, and left the residence to dispose of the evidence. The court finds that Latham's murder was a conscienceless or pitiless crime and unnecessarily torturous to the victim. The court finds that the defendant's bruality to Latham exceeds that which is normally present in a capital case.

Brenda Whitehead McCutchin and her three-year-old grandson, Joshua Dewayne Hodges were murdered in their bed. Both Brenda and Joshua were asleep when the defendant first struck

Brenda with a claw hammer. After the defendant hit Brenda with the claw hammer, Joshua woke up crying. At that point, the defendant began attacking both Brenda and Joshua with the claw hammer. Brenda tried to defend herself and/or Joshua. Dr. Embry testified that Brenda suffered lacerations to her face, injuries to her shoulder and right side of the body, broken jaw on both sides of the face, and broken left middle and ring fingers with extensive blunt-force injuries to the hands. Both Brenda and Joshua suffered fractured skulls. The defendant told his girlfriend that "they don't die instantly". Accordingly to Dr. Embry, a person may live longer with a fractured skull because the brain can swell. One autopsy photograph shows Brenda's herniated brain protruding from the skull. In addition to a fractured skull, Joshua suffered lacerations consuming a large area around the right eye. He suffered injuries to both sides of his face, the right side of his neck, and the upper torso. Perhaps in an attempt to ward off the blows, Joshua suffered a 5¼ inch cut to his right little finger. Ultimately Brenda and Joshua died from their injuries but not before each of them experienced intense pain from the savage beatings. Brenda suffered approximately twenty forceful blows to her head. Joshua suffered approximately sixteen forceful blows to his head. As did Latham, Brenda and Joshua suffered psychologically. Surely, Brenda was horrified when she awoke to see her own brother attacking her with a claw hammer as she lay helpless in her own bed. During the attack, there was sufficient time for Brenda to fear not only for her life but to fear for the life of her three-year-old grandson who

was sleeping just inches away. Certainly, Brenda experienced mental suffering and agony upon realizing that her brother intended to kill not only her, but also her grandson and that she was helpless to prevent it. Joshua could not possibly have escaped mental suffering. He was awakened from sleep by the sounds of the attack on his grandmother. When he cried out, he saw his beloved uncle raise a claw hammer to him as well. Certainly, Joshua experienced extreme shock, fright, and horror before his death. The murders of Brenda McCutchin and Joshua Hodges were committed under circumstances that caused fear and pain to them before their deaths. While Brenda and Joshua lay dying or dead in their bed, the defendant left messages in various rooms of the house. He wrote, "Fuck this God", "Fuck this world", "I'll be dead too", "It's about to pick up", "Don't look for me", "Tammy I love you Always Never 4-get Baby", "Killing is my business", and "My whole life I have been ran over. It's stopping now." Afterward, the defendant retrieved the claw hammer and proceeded to Latham McCutchin's house to kill Latham. The court finds that the murders of Brenda McCutchin find Joshua Hodges were conscienceless or pitiless crimes and unnecessarily torturous to the victims. The court finds that the brutality the defendant exhibited to Brenda and to Joshua exceeds that which is normally present in a capital case.

The court finds that the State proved beyond a reasonable doubt that each of the murders of the three victims was especially heinous, atrocious or cruel compared to other capital offenses.

The court finds that aggravating circumstance number 9 under § 13 A-5-49 does apply. The jury, by its verdict, found that the defendant committed the capital offense of murder by intentionally causing the death of two or more persons by one act or pursuant to one scheme or course of conduct. The defendant told investigators that he was in a rage when he decided to kill his sister and brother-in-law. He first attacked his sister, Brenda Whitehead McCutchin. Brenda was asleep in bed with her three-year-old grandson, Joshua Dewayne Hodges. After the defendant hit Brenda with the claw hammer, Joshua woke up crying. At that point, the defendant began attacking both Brenda and Joshua with the claw hammer. Brenda and Joshua suffered fractured skulls. The defendant told his girlfriend that "they don't die instantly". Accordingly to Dr. Embry, a person may live longer with a fractured skull because the brain can swell. Ultimately Brenda and Joshua died from their injuries. Brenda suffered approximately twenty forceful blows to her head. Joshua suffered approximately sixteen forceful blows to his head. After killing Brenda and Joshua, the defendant traveled to his brother-in-law's house. The defendant's purpose was to kill his brother-in-law, Latham. The defendant attacked Latham with the same claw hammer that he had used to kill Brenda and Joshua. Latham suffered at least ten forceful blows to his head as well as numerous other injuries. Dr. Embry testified that all three victims died from multiple blunt-force injuries. Based on the evidence, this court concurs with the jury's finding. The court finds that the defendant intended to kill all three victims at the time that

he killed the first victim. The court finds that the State proved beyond a reasonable doubt that the defendant committed the capital offense of murder by intentionally causing the death of two or more persons by one act or pursuant to one scheme or course of conduct.

The court finds that aggravating circumstance number 10 under §13 A-5-49 does not apply. The capital offense was not one of a series of intentional killings committed by the defendant.

MITIGATING CIRCUMSTANCES

The court finds that mitigating circumstance number 1 under §13A-5-51 exists. The defendant has no significant history of prior criminal activity.

The court finds that mitigating circumstance number 2 under §13A-5-51 does not exist. The capital offenses were not committed while the defendant was under the influence of extreme mental or emotional disturbance. The court has fully considered the testimony of Dr. Roger Lacy, Dr. Lee Evans, Dr. Melissa Clinger, and all other witnesses during the guilt and penalty phases of the trial. The defendant maintains that he was under the influence of extreme mental or emotional disturbance due to his use of crystal methamphetamine and Xanax. In his confession to law enforcement, the defendant indicated that he had taken seven or eight Xanax pills prior to the three murders. The defendant did not reveal to law enforcement that he had been using crystal methamphetamine each day of the week prior to the murders. The first evidence of defendant's use

of crystal methamphetamine was reported by Dr. Melissa Clinger in her Forensic Evaluation Report. The information was provided to Dr. Clinger by the defendant during the evaluation process. Later, the defendant reported to Dr. Lacy and Dr. Evans that he had been on a crystal methamphetamine binge the week prior to the murders. He also reported to the experts that he had taken Xanax the night of the murders. The defendant's friends testified that the defendant was a frequent user of crystal methamphetamine. The court does not doubt that the defendant was using crystal methamphetamine the week prior to the crimes and Xanax the night of the crimes. The court, however, has no credible evidence regarding the quantity of drugs ingested by the defendant or the times of ingestion. Furthermore, the evidence indicates that over time people develop immunities and tolerance to the effects of drugs. The defendant had been abusing drugs for years. The court finds by a preponderance of the evidence that the defendant did not commit the murders while under the influence of extreme mental or emotional disturbance. The defendant's demeanor and actions immediately following the crimes indicate otherwise. The defendant's friends and acquaintances testified that the defendant acted normally shortly after the murders. Teresa Manning testified that she saw the defendant at the store where she worked on December 24, 2001, at 1:00 A.M. or 1:30 A.M. She said that she and the defendant carried on a conversation and that there was nothing unusual about how the defendant was acting. The defendant attended a party immediately after the murders.

Hannah Robertson testified that she saw the defendant at the party between 1:00 A.M. and 2:00 A.M. on December 24, 2001. She said the defendant looked better than usual. She said that the defendant's hair looked wet. She carried on a conversation with the defendant and said that he seemed normal, that he could talk very good, and did not appear to be intoxicated. Nick Logan, the defendant's best friend, testified that he saw the defendant at the party on December 24, 2001. In fact, he and the defendant left the party and rode around for approximately twenty minutes. Mr. Logan talked with the defendant for a long period of time shortly after the murders and he said that the defendant did not appear to be intoxicated. He said he noticed nothing out of the ordinary. The court does not find that the defendant was so impaired that he was suffering from an extreme mental or emotional disturbance at the time of the offenses.

The court finds that mitigating circumstance number 3 under §13A-5-51 does not exist. The three victims were not participants in the defendant's conduct nor did any of them consent to it.

The court finds that mitigating circumstance number 4 under §13A-5-51 does not exist. The defendant was not an accomplice in the capital offense committed by another person nor was his participation relatively minor. The defendant was the sole participant in each capital offense and his conduct caused the deaths of Latham Durwood McCutchin, Brenda Whitehead McCutchin, and Joshua Dewayne Hodges.

The court finds that mitigating circumstance number 5 under §13A-5-51 does not exist. There

exists no evidence that the defendant acted under extreme duress or under the substantial domination of another person.

The court finds that mitigating circumstance number 6 under §13A-5-51 does not exist. The defendant contends that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired due to intoxication. The court has fully considered the testimony of Dr. Roger Lacy, Dr. Lee Evans, Dr. Melissa Clinger, and all other witnesses during the guilt and penalty phases of the trial. Even though there was some testimony that the defendant may have been under the influence of crystal methamphetamine and Xanax at some time prior to or during the crimes, the court finds that the defendant was not so impaired at the time of the offenses that he did not appreciate the criminality of his conduct or could not conform his conduct to the requirements of the law. As stated previously, the defendant was observed by many friends and acquaintances immediately after the murders and they noticed nothing about the defendant that indicated he was under the influence of drugs. The defendant's demeanor and actions during and immediately following the crimes indicate he was well aware of the criminality of his conduct. Before leaving home where he had killed Brenda and Joshua, the defendant gathered clean clothes to change into after the murder of Latham. He also attempted to burn Brenda's home with kerosene and a cigarette. He was able to drive across town to Latham's house and devise a scheme to get into the house and kill Latham. After killing Latham,

the defendant was able to devise a plan to hide the crimes. He showered and placed his soiled clothes, claw hammer, and knife in a garbage bag that he looked for and found at Latham's house. He attended a party where he was sure to be seen by friends. He concocted a story about how he was having to leave town and related it to friends. When his friend, Nick, asked for permission to talk with Brenda to help resolve the dispute between the defendant and his sister, the defendant concocted another lie about Brenda's whereabouts to keep Nick from going to the house. The defendant was able to drive to Stevenson, Alabama, and back to dispose of the evidence of his crimes. Later, the defendant's girlfriend asked him what was bothering him and the defendant asked, "What is the worse thing you know of anybody doing?" and then he confessed his crimes. The court finds by a preponderance of the evidence that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

The court finds that mitigating circumstance number 7 under §13A-5-51 does not exist. The defendant was twenty-seven (27) years of age at the time of the crime.

NON-STATUTORY MITIGATING CIRCUMSTANCES

During the penalty phase of the trial, the defendant presented evidence of non-statutory mitigating circumstances.

Evidence exists that the defendant, during his childhood, suffered from obesity, was rejected by his peers, and provided the primary care to his ailing parents. During adolescence, the defendant experimented with drugs to gain friendships. From the age of twenty years to the age of twenty-four years, the defendant made a lot of friends but was regularly abusing drugs. The following years, the defendant's drug use continued to worsen. The court finds that the defendant suffered from a substance dependence disorder that went untreated.

The defendant presented evidence that he suffers from dysthymic disorder, a mental illness that exists when a person has chronic feelings of sadness and low self-esteem. The court recognizes that the defendant experienced periods of sadness and low self-esteem during his life but does not find that these periods were severe or chronic. The evidence shows that the defendant was doted on by his parents and had a relatively happy childhood. During early adulthood, the defendant socialized with his extended family and friends and maintained employment. The defendant was able to function appropriately in society although he did not always choose to do so.

The defendant presented evidence that he was detrimentally affected by the death of his parents. Surely, the defendant experienced sadness and loss by the death of his parents. The defendant was an adult, however, when his parents died. The court does not find that the defendant was harmed by his parents' deaths.

The evidence established that the defendant demonstrated the capacity to love and care for another human being during his life. The

defendant loved and cared for his elderly parents. The evidence further established that the defendant had friends and relatives that cared for him.

Based on the evidence, the court finds that the defendant is a low risk for future violence in prison and would adapt well to prison environment. The court finds that, once taken into custody, the defendant cooperated with law enforcement and confessed to the crimes. The court further finds that the defendant has expressed remorse for the deaths of the victims.

ADVISORY VERDICT

In each case, the court has considered the recommendation of the jury in its advisory verdict and given it due weight. During the punishment phase of the trial, the jury voted eleven (11) to one (1) that the sentence in each case be death.

CONCLUSION

The court has taken into account all possible mitigators, both those enumerated by statute and the non-statutory ones. All of the mitigating circumstances taken together are extremely weak in comparison to the aggravating circumstances that exist in each case.

After careful review of the facts of each case, the court has engaged in the process of weighing the aggravating and mitigating circumstances as required by law. In each case, the court determines that the aggravating circumstances outweigh the mitigating circumstances.

Upon careful consideration of all the evidence, the pertinent statutory provisions, and the evidence presented at the sentencing hearing, together with the advisory verdict of the jury, it is the decision of the court that the proper sentence is death.

ACCORDINGLY, IT IS ORDERED, ADJUDGED, AND DECREED by the court that the defendant be and he is hereby sentenced to death for each of the three offenses of capital murder. In view of the sentence, the judgment is appealed as a matter of law. The court sets no appeal bond. Hoyt Baugh and Jayson Carroll, who were in court for the sentencing hearing, are appointed to represent the defendant on appeal.

Done this 29th day of April, 2004.

/s/ Jenifer C. Holt
JENIFER C. HOLT
Circuit Judge

STATE OF ALABAMA, JACKSON COUNTY
IN THE CIRCUIT COURT

Case No.: CC-02-99, 100, 101

STATE OF ALABAMA,

Plaintiff

—v.—

JAMES BEN BROWNFIELD, JR.,

Defendant

MOTION FOR NEW TRIAL

Without benefit of any official documentation or transcript save for uncertified copies of the court file and a preliminary draft of the transcript to preserve any and all issues, reviewable either on direct appeal or other post-conviction remedies, and reserving the right to amend or modify this motion within a reasonable time upon receipt of a transcript and additional documentation, defendant James Ben Brownfield moves the Court to set aside the verdicts and imposition of sentences

and to grant him a new trial on the adjudication of guilt phase and/or the sentencing phase and/or a rehearing on the imposition of sentences for one or more of the following reasons:

1. The verdicts are contrary to the law.
2. The verdicts are contrary to the facts.
3. The verdicts are contrary to the weight of the evidence.
4. The verdicts are contrary to the law and to the weight of the evidence.
5. The sentences are contrary to the law.
6. The sentences do not comport to the facts.
7. The sentences do not comport to the weight of the evidence.
8. The sentences do not comport to the law and to the weight of the evidence.
9. The defendant was denied a fair and impartial trial because of improper judicial rulings and actions before and during the guilt and penalty phases of the trial.
10. The defendant was denied a fair and impartial trial because the Court erred in sustaining objections to questions addressed to a witness.
11. The defendant was denied a fair and impartial trial because the Court erred in admitting testimony of a witness.

in denying the following defendant's requested jury charge:

> In Alabama there are two possible penalties for a person whom the jury convicts of capital murder. These penalties are imprisonment for the defendant's natural life with no possibility of parole, and death. In the event that the accused is convicted of capital murder, and only in that event, there will be a second phase of this trial called the penalty phase. If the accused is convicted of capital murder, the same jury is used in both phases.
>
> The first phase of the trial is the guilt-innocence phase. In this phase, the jury decides whether the state has proven the defendant guilty of capital murder or some other offense, beyond a reasonable doubt, or whether the defendant is not guilty of any crime. In making the guilt innocence decision, the jury cannot consider any possible sentence. At that stage you will only consider whether the accused has been proven guilty of capital murder or some other offense beyond a reasonable doubt. Any decision in your mind, expressed or unexpressed, concerning the possible penalties at that point is very improper and simply must not occur.
>
> Only in the event that the accused has been proven guilty of capital murder beyond a reasonable doubt will there be

a sentencing phase of this trial. Only at that time, at its conclusion, and after I have charged you on the law concerning your determination and how it shall be made are you to discuss an appropriate sentence or even form an opinion about an appropriate sentence.

Statistics tell us that many jurors make up their minds about the appropriate sentence during the guilt-innocence phase of the trial. I am instructing you now that this is highly improper and violates the law and the instructions of this court.

211. The defendant was denied a fair and impartial trial because the Court erred in denying the following defendant's requested jury charge: "To charge against him in the indictment the defendant has also entered a plea that he is not guilty by reason of severe mental disease or defect."

212. The defendant was denied a fair and impartial trial because the Court erred in denying the following defendant's requested jury charge:

It is an affirmative defense to a prosecution for any crime that at the time of the commission of the acts constituting the crime, the defendant:

1. was suffering from a severe mental disease or defect; and

tently, as by accident, or without knowing the nature or tendencies of the substance.

A person is presumed to know the nature or tendencies of a substance if, under the circumstances, he reasonably should have known such nature and tendencies.

239. The defendant was denied a fair and impartial trial because the Court erred in the convening of the grand jury.

240. The defendant was denied a fair and impartial trial because the Court erred in composing the grand jury.

241. The defendant was denied a fair and impartial trial hecause the Court erred in the selection of the foreperson.

242. The defendant was denied a fair and impartial trial because the Court erred in the convening of the jury venire.

243. The defendant was denied a fair and impartial trial because the Court erred in composing the jury venire.

244. The defendant was denied a fair and impartial trial because the Court erred in die convening of the petit jury.

245. The defendant was denied a fair and impartial trial because the Court erred in composing the petit jury.

246. The defendant was denied a fair and impartial trial because the method of

selecting the grand jury and the jury venire in Jackson County deprived him to his right to trial by a jury of his peers.

247. The defendant was denied a fair and impartial trial because the Court erred in sustaining objections to questions addressed to the jury venire.

248. The defendant was denied a fair and impartial trial because the Court erred in allowing questions to be posed to the jury venire.

249. The defendant was denied a fair and impartial trial because the Court erred in granting the State's challenges for cause after qualifying on death.

250. The defendant was denied a fair and impartial trial because the Court erred in denying the defendant's challenges for cause.

251. The defendant was denied a fair and impartial trial because the Court erred in allowing the State to use its peremptory challenges to exclude black persons and other groups.

252. The defendant was denied a fair and impartial trial because the Court rested its decision in part on erroneous and/or inaccurate, incomplete information in the pre-sentence investigation report to which the defendant had no meaningful opportunity to explain or deny.

253. The defendant was denied a fair and impartial trial because of prosecutorial misconduct during guilt phase argument.

254. The defendant was denied a fair and impartial trial because of prosecutorial misconduct during penalty phase argument.

255. The defendant was denied a fair and impartial trial because of prosecutorial misconduct during sentencing hearing.

256. The foregoing errors of the Court violate the rights of the defendant under die Constitutions of the United States and Alabama, including, but not limited to, the right to due process of law established by U.S. Consti., Amends. V and XIV and Ala. Const., Art. I Section 6; the right to equal protection of the laws established by U.S. Const., Amend. XIV and Ala. Const., Art. I Sections 1, 6 and 22; the freedom from cruel and unusual punishments established by U.S. Const., Amends. VIII and XIV and Ala. Const., Art. I Section 15; the right to freedom from unreasonable searches and seizures, as established by U.S. Const., Amends. IV and XTV and Ala. Const., Art. I Section 5; the right to compulsory process for witnesses, as established by U.S. Const., Amends. VI and XIV and Ala. Const., Art. I Section 6; the right to confrontation of witnesses, as established by U.S. Const., Amends. VI and

XIV and Ala. Const., Art. I Section 6; the right to be informed of the nature of an accusation, as established by the U.S. Const., Amends. VI and XIV and Ala. Const., Art. I Section 6; the right to trial by a fair and impartial jury, as established by U.S. Const. Amends., VI and XIV and Ala. Const., Art. I Sections 6 and 11; the freedom from self-incriminating testimony, as established by U.S. Const., Amends. V and XIV and Ala. Const., Art. I Section 6; and the right to indictment by a fair and impartial grand jury, as established by Ala. Const., Art. I Section 8.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the District Attomey and James Ben Brownfield, by placing same in the U.S. Mail postage prepaid and properly addressed this the 22 day of November, 2004.

/s/ STEPHEN P. BUSSMAN
STEPHEN P. BUSSMAN

attorneys will do their closing arguments. And the court will then instruct you regarding the law. And then this case will be put to you for an advisory verdict. So we will be in recess until 1:15. But let me remind you not to discuss with anyone or allow anyone to discuss the case with you or in your presence, and don't discuss it among yourselves. Don't listen to any news accounts, and don't read any news accounts of this case. And with those instructions, you are released until 1:15. thank you.

(JURY NOT PRESENT.)

THE COURT: All right; is there anything further?

MR. FRICKS: Judge, we would just like to put on the record concerning the aggravating circumstance. And we would object to that as an aggravating circumstance—

THE COURT: Object to what?

MR. FRICKS: Using especially heinous, atrocious or cruel as an aggravating circumstance without some qualification from the court. And this circumstance has the application only to the crime of such a nature that it's a conscienceless or pitiless and unnecessarily torturous to the victim. And that's *Lawhorn*. L-A-W-H-O-R-N, *v. State*, 581 So.2d 1159 and also *Ex Parte Bankhill*, 585 So.2d 112. Now, this circumstance focuses on the actual pain and fear experienced by the victim and not only the defendant's actual intent that pain and fear occur. And that's *Haney v. State*, 603 So.2d 368. And in *Ex Parte Clarke*, 728 So.2d 1126, in that case, basically the capital murder was held

not to be heinous, atrocious or cruel even though the victim was shot five times in the back of the head and once behind the ear because there was no evidence that the victim was even conscious and aware after the first shot was fired. And the case concluded that the heinous, atrocious or cruel cannot be based upon any speculation. And in *Barksdale v. State,* 788 So.2d 898 which is a Supreme Court of Alabama 2000 case it is necessary that the State present evidence that the victim suffered some type of physical violence beyond the necessary and sufficient to cause death. Additionally, to support this aggravating factor, the time between at least some of the injurious acts must be an appreciable lapse of time sufficient to cause prolonged suffering, and the victim must be conscious or aware when at least some of the additional or repeated violence is inflicted. And, again, I believe this requirement is not subject to speculation, and, again, that's *Haney v. State,* 603 So.2d 368. Now, in *Odom v. State,* 403 So.2d 936, that's out of the Florida Supreme Court 1981, and it says that we recognize that an instantaneous death caused by gunfire is not ordinarily a heinous killing. And the Alabama courts dealing with certain types of execution style murders and in one example, *Riever.* R-I-E-V-E-R, *v. State,* 663 So. 2d 985, and I believe that's an Alabama Supreme Court 1995 case. And it said that the victim had been stalked by the defendant. And before the murder, the victim was very much afraid of the defendant, and she was robbed and was shot in the wrist and then in the head. And she was alive when she was found but subsequently died referring to that, and that would be an application

of the aggravating circumstance, you know, heinous, atrocious or cruel. And in *Lawhorn v. State*, 581 So.2d 1159, it's an Alabama Criminal Appeals case in 1990 and then affirmed by the Alabama Supreme Court in 1991 at 585 So.2d 1179, but the victim was run down and confronted with the barrel of a shotgun in his face. And he was shot and shot again after getting back up, and he was then shot three times while lying on the ground trapped and making gurgling noises. And I believe the burden is upon the State to prove beyond a reasonable doubt, and it seems like a key issue in these cases and other cases that I can cite is the consciousness of the victim. And, Judge, just again for the record, I need to place that there.

THE COURT: All right; I will instruct on the heinousness, atrociousness and cruel aggravating circumstance in all three cases; two or more persons killed pursuant to one scheme in all three cases; and the burglary aggravation in Latham's case. All right; we'll be in recess until 1:15.

(END OF MORNING SESSION)

(Upon reconvening)

(AFTERNOON SESSION BEGINNING AT 1:15)

THE COURT: All right; before the closing arguments, I wanted to go over the mitigating circumstances that I think you requested. And there may be some that you didn't, but I felt like were covered. So if you have an objection to any of these, let me know. And the State can do likewise. Whether the defendant suffered risk factors during his childhood such as being obese and being

rejected by his peers and being the primary caregiver to his ailing parents; whether the defendant experienced traumatic events during his life; whether the defendant suffers or suffered from the major mental illness substance dependence disorder; whether the defendant suffers from a major mental illness dsthymic order; whether the defendant exhibited signs of mental or emotional problems that went untreated; whether the defendant was detrimentally affected by the deaths of his parents; whether the defendant has demonstrated the capacity to love and care for another human being; whether the defendant has friends and relatives who love and care for him; whether the defendant is a low risk for future violence and would adapt well to prison environment. Now, those are in addition to the statutory, and there were three statutories, right?

MR. FRICKS: Yes

THE COURT: All right you can bring the jury in.

(JURY PRESENT.)

The Court: All right; Mr. Pierce are you ready for your closing argument?

MR. PIERCE: Yes, Your Honor.

CLOSING ARGUMENT

BY MR. PIERCE:

May it please the court, Mr. Fricks and Mr. Hartline? Ladies and gentlemen of the jury, "What is the worst thing you can imagine someone doing?" Why would Ben Brownfield have asked Tammy Farmer that question late on December 24th and the 25th? "What is the worst thing you can imagine somebody doing? And that's what she testified to. And why did he ask it? Because he had done it. He had committed the unimaginable crime. He knew then, as you know now, that it was an ultimate crime. And it deserves an ultimate sentence.

Now, the judge will instruct you on the process that you have to go through now. But in short, and please rely on what she instructs you, because this is just argment, and this is not evidence. But you're going to have to decide if we have established aggravating circumstances and if we, the State, have proven that to you. And then once you do that, if you do that, then you look at the mitigating circumstances. And there's not a math formula where you can say, well, three of those and four of those, so the four wins. You know, it ends up being your balancing test. In other words, one aggravating. circumstance can outweigh twenty mitigating circumstances or vice versa. But once you find that aggravating circumstance—that's what you've got to do first, and we have that burden. And we've got to show you that there was an aggravating circumstance. But once we've done that, then you get to decide whether they've shown any mitigating circumstances, and then

you get to balance it. And it's a weighing test. There is no formula.

And, so, I would ask you to review what the defendant has offered you in the way of mitigation. And I believe they've presented that Ben Brownfield has no significant history of prior criminal history. And I would concede that I, too, don't know of any other significant criminal history, or I'm sure you would have heard about it. And they offer to you that the capital offenses were committed while Ben Brownfield was under the influence of extreme mental or emotionl disturbance. And I would ask of you what is the evidence of that claim? What have they presented to you that supports that claim? That he missed court one day and that stressed him out right before these murders? That Brenda hadn't gotten his pills from their supplier and that stressed him out? Or that he hadn't seen Tammy in awhile? You know, he was having woman problems or girl problems? Is that the mental or emotional disturbance? You know, everybody has bad days, and everybody has bad weeks, and some people have bad years. And everyone experiences stress, and that's not the question here. The question is it's not whether he had a mental or emotional disturbance but whether it was an extreme—an extreme mental or emotional disturbance. And I would argue to you that there's not been sufficient evidence to support that. Now, they may claim that the drug use supports that cause, and I'll address this on the next one. But they will argue to you that the capacity of Ben Brownfield to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law

was substantially impaired. And, ladies and gentlemen, this is not that Ben Brownfield was drunk or high. This is that he was so drunk and that he was so high that his ability to appreciate the fact that bashing someone's head in is against the law was substantially impaired. And I had a hard time grasping that. And it's that he's so drunk and so high that if he knew that it was against the law, you know, that you're not supposed to bash people's heads in with a hammer, that he was unable to conform himself to that. You know, his ability to conform to the law, even if he understood it, was substantially impaired. And I don't believe that there's been evidence, and you get to be the judge of that. You know, do you think that he was that drunk? Do you think that he was that high that he didn't know those things? If he was that high, why did he turn out the lights and shut the door and lock it up over at Wallace Lane? Why did he try to burn the house down? Why would you do that? Why did he dispose of the evidence and hide it? You know, why would you hide evidence of a crime if you don't know it's a crime? Why didn't he ever go back home? Why did he lie to his friends? Why did he claim unimaginable problems? The other reason is because at the time he killed Latham, Brenda and Josh, he knew it was wrong. And you can recall all of the testimony, and you've been through a lot, and there's no need to rehash it all. But you remember the testimony of his driving around town and driving from Shelby to Wallace and to Sebring Drive to visit friends and to Wal-Mart and up to Stevenson and back and to Sarah Betty. And you remember testimony of his friends and you remember testimony from Wal-

Mart. And I would ask you: Do you have any evidence other than his statement? You know, do you have any evidence that he was substantially impaired? Now, how far are you willing to let him go in blaming the drugs? Is he now the victim? And as I've told you before, I'm not trying to argue that Ben Brownfield never used drugs. That's not what I'm trying to say, and that's not what's been said during this trial. What I'm asking you to do is what all of the experts have apparently failed to do is measure his statement against the evidence and then decide how much validity you want to put in it.

Now we tried to establish some aggravating circumstances for you and certainly you can rely on the evidence that you've heard for the past three weeks. You know, it's not just today's evidence. And I would ask you to review the circumstances surrounding Brenda McCutchin's death. But we would argue to you that the aggravating circumstance that the defendant intentionally caused the death of two or more persons pursuant to one scheme or one course of conduct applies to her death. That's an aggravating circumstance that you can consider. And we would argue to you that the capital offense was especially heinous, atrocious or cruel compared to other capital offenses. And I would suggest to you that the evidence showed that she was alive for some period of time and that she tried to protect herself and, as a result of that, received significant injuries to her hands. And that this occurred while she laid unsuspecting, asleep in a bed next to her grandson and that her head was repeatedly, repeatedly bashed. Now, how many blows do you think it took

to kill her? And then how many after that did he continue to inflict on her? We would offer to you that those aggravating circumstances, those two, would outweigh anything that the defendant has offered to you in the way of mitigating circumstances. And Josh Hodges, again, that the two or more persons pursuant to one scheme or course of conduct applies to him. And that's an aggravating circumstance and that, again, it was especially heinous, atrocious or cruel compared to other capital offenses. An innocent, helpless, unsuspecting child was repeatedly bashed in the head. And, finally, reviewing the death of Latham McCutchin, we would offer to you that there are three aggravating circumstances in that case: That the capital offense occurred during the commission of a burglary; that the capital offense was part of two or more deaths pursuant to one scheme or course of conduct; and that the capital offense, the murder of Latham McCutchin, was especially heinous, atrocious or cruel compared to other capital offenses. Now, I would offer to you that Latham McCutchin, before he died, knew that he was going to die, that when he was fighting Ben Brownfield, he was sixty-four-years-old and Ben was around twenty-seven. Latham McCutchin, you've seen he pictures of him. He wasn't that big of a man. And you've seen Ben Brownfield. Latham knew that he was going to die, and he struggled to survive. But he wasn't going to make it. It just wasn't going to happen. He did survive for some period of time according to Dr. Embry. And you can tell because of the defensive wounds that he sustained and because of the blood that showed up in his system. And he received multiple

blows to the head. Now, again, how many did it take to kill him and then how many were added to that? And then he was stabbed in the heart, and then he was gashed in the neck.

Now, do you consider those things to be heinous, atrocious, cruel, wicked or evil or cold blooded? You know, you must do your duty, and you must fulfill your oath to review the evidence and weigh the evidence and render a verdict and based on the evidence not argument, you know, not what myself or Mr. Rhodes or Mr. Fricks or Mr. Hartline tell you, but the evidence. Your duty will lead you to one outcome, and that is that the ultimate crime deserves the ultimate sentence. Thank you.

THE COURT: Mr. Hartline?

CLOSING ARGUMENT

BY MR. HARTLINE:

May it please the court, Mr. Rhodes and Mr. Pierce? Ladies and gentlemen of the jury, I want to thank you for your attention during this phase of the trial. This is our last chance to talk to you. We don't get—the prosecution has the burden in this case, so they get to get back up and talk to you after this, but this is our last chance.

I anticipate the judge is going to instruct in a few minutes that your duty here will now be to weigh the circumstances, both aggravating and mitigating in order to make an advisory recommendation to the judge about whether or not—about either life without parole or death by execution of Ben Brownfield. Now, I'm want to

start out by saying again that nothing I'm going to say in this part or in this argument, in any way do I want it to be seen as minimizing the loss or detracting from the loss of the lives of Brenda and Latham and Josh. However, I want to talk about the life of Ben Brownfield.

Ben was born in Scottsboro. He's lived his whole life in Scottsboro. Dr. Salekin testified this morning about Ben's childhood. He was obese, and because of that, he was picked on and he lived an isolated life as a child growing up. And he did not have a lot of friends. His parents were elderly, and they were sick. And he took on a parenting role. Dr. Salekin testified that this affected his development, and this was while he was still a child, that he was probably depressed aggravating circumstances outweigh the mitigating circumstances?" Well, if these aren't the appropriate cases, then what cases ever will be? Thank you.

THE COURT: Thank you, Mr. Rhodes.

JURY CHARGE FOR ADVISORY VERDICT

Ladies and gentlemen, it's my duty again to instruct you or to charge you as to the law. In charging you, I want to remind you of the instructions that I gave you at the first stage of the trial concerning your duties and functions as jurors.

Now, the State has the burden of proving aggravating circumstances exist, and this burden remains on the State throughout the case. The defendant is not required to prove that they do not exist. The burden of proving that aggravating circumstances exist rests upon the State, and the State must satisfy you that they do exist. Unless

the State so satisfies you of the existence of aggravating circumstances, by proof beyond a reasonable doubt, then the defendant is entitled to receive a sentence of life imprisonment without the possibility of parole.

The phrase "reasonable doubt" is self-explanatory, and efforts to define it do not always clarify the term. It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in the case. It is a doubt based upon reason and common sense. It does not mean a vague or arbitrary notion, but it is an actual doubt based upon the evidence, the lack of evidence, a conflict in the evidence, or a combination thereof. It is a doubt that remains after going over in your minds the entire case and giving consideration to all the testimony. It is distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

Now, because I am giving instructions to you does not mean that you are to assume as true any question of fact referred to in these instructions. Instead, it is left to you to determine what the facts are and what the recommended sentence should be.

The law of this state provides that the punishment for the capital offenses for which you have convicted this defendant is either death by lethal injection or life imprisonment without the possibility for parole. The law provides that which of

the two punishments should be imposed upon the defendant depends on whether aggravating circumstances exist and, if so, whether the aggravating circumstances outweigh the mitigating circumstances.

An aggravating circumstances is a circumstance specified and defined by law that indicates, or tends to indicate, that the defendant should be sentenced to death. A mitigating circumstances is any circumstances that indicates, or tends to indicate, that the defendant should be sentenced to life imprisonment without eligibility for parole instead of death. The issue at this sentence hearing concerns circumstances of aggravation and circumstances of mitigation that you should consider and weigh against each other in deciding what the proper punishment is in the case.

In making your decision, concerning what that punishment should be, you must determine whether any aggravating circumstance exist, and if so, you must determine whether any mitigating circumstance or circumstances exist. In making your determination concerning the existence of aggravating and mitigating circumstances, you should consider the evidence presented at this sentencing hearing. You should also consider any evidence that was presented during the guilt phase of the trial that is relevant to the existence of any aggravating or mitigating circumstance.

The law of this state provides a list of aggravating circumstances that may be considered by the jury if the jury is convinced beyond a reasonable doubt based on the evidence that one or any of such aggravating circumstances exist. The

definition that I gave you concerning reasonable doubt is the standard that you must apply.

If the jury is not convinced beyond a reasonable doubt based upon the evidence that one or more such aggravating circumstances exist, then the jury must recommend that the defendant's punishment be life imprisonment without parole regardless of whether there are any mitigating circumstances in the case.

Of the list of aggravating circumstances provided by law, there are two circumstances, which you may consider in the cases, and a third one in case no CC-02-99 involving the death of Latham Durwood McCutchin, if you're convinced beyond a reasonable doubt and to a moral certainty based on the evidence that such circumstances do exist.

That fact that I instruct you on such aggravating circumstances or define them for you does not mean that the circumstances have been proven beyond a reasonable doubt. Whether any aggravating circumstance which I instruct you on or define for you has been proven beyond a reasonable doubt based on the evidence is for you, the jury alone to determine. The State contends that there are two aggravating circumstances that you may consider in all three cases if you find from the evidence that they are proven beyond a reasonable doubt.

Number One, that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. The term "heinous" means extremely wicked or shockingly evil. The term "atrocious" means outrageously wicked and violent. The term cruel means designed to inflict a

high degree of pain with utter indifference to or even enjoyment of the suffering of others. What is intended to be included in this aggravating circumstance is those cases where the actual commission of the capital offense is accompanied by such additional acts as to set the crime apart from the norm of capital offenses. For a capital offense to be especially heinous or atrocious, any brutality, which is involved in it, must exceed that which is normally present in any capital case. For a capital offense to be especially cruel, it must be a conscienceless or pitiless crime, which is unnecessarily torturous to the victim. All capital offenses are heinous, atrocious, and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness, atrociousness or cruelty exceeds that which will always exist when a capital offense is committed.

Also, under our law, torture has a specific meaning that must bind your deliverations. "Torture" is the deliberate infliction of pain in a manner calculated to unnecessarily increase the suffering that an individual undergoes. To constitute torture, the victim must experience and be aware of this magnified pain. It is not enough that the manner of death was despicable. The point is that the victim was deliberately made to undergo, feel, and suffer unconscionable and increased pain. If you or anyone of you have a reasonable doubt whether the victim was aware of and actually suffered this pain before death, you must find that this aggravating circumstances was not proved. And, finally, I charge you that the aggravating circumstance especially heinous atrocious and cruel

relates purely to matters that occurred before the death of victim.

The second aggravating circumstance that the State alleges in the cases is that the defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct.

The law governing your consideration of this aggravating circumstance that the State contends exists is the same law that applied at the first phase of the trial. Your finding that the defendant is guilty of capital murder entailed a finding that the defendant was guilty of intentionally causing the death of two or more persons by one act or pursuant to one scheme or course of conduct. And I will not repeat the description of the law related to that offense now, that it is for you to determine how much weight to give to that particular matter.

A third aggravating circumstance that you may consider in case number CC-02-99 involving the death of Latham Durwood McCutchin, is that the capital offense is committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, burglary.

The law of the State of Alabama defines burglary in the first degree as follows: A person commits a burglary in the first degree if he knowingly and unlawfully enters or remains unlawfully in a dwelling and he does so with intent to commit a crime therein, and while effecting entry or while in the dwelling or in the immediate flight there-

from, he uses or threatens the immediate use of a dangerous instrument.

The law governing your consideration of this aggravating circumstance that the State contends exists is the same law that you applied at the first phase of the trial. Your finding that the defendant is guilty of capital murder entailed a finding that the defendant was guilty of burglary in the first degree. And I will not repeat the description of the law related to that offense now. It is up to you to determine how much weight to give to that particular matter.

Now, as I've stated to you before, the burden of proof is on the State to convince each of you beyond a reasonable doubt as to the existence of any aggravating circumstance considered by you in determining what the punishment should be in the cases. This means that before you can even consider or ever consider a sentence of death, each and every one of you must be convinced beyond a reasonable doubt based on the evidence that at least one or more of the aggravating circumstances exist. In addition, in considering the burden of proof, each and every one of you must agree on the specific nucleus of facts alleged to make the circumstances of the offense especially heinous, atrocious, or cruel. It is not enough that some of you agree on some facts and some on others. You must unanimously agree on the same facts to conclude that this aggravating circumstance has been established. This means that if some of you find that particular facts satisfy this aggravating circumstance while others believe some other facts satisfy this aggravating circumstance, the aggra-

vating circumstance has not been established and you must reject it as a matter of law.

The evidence upon which a reasonable doubt about an aggravating circumstance may be based is both the evidence you heard in the guilt stage of the trial and the evidence you've heard in this sentencing hearing. The defendant does not have to disprove anything about an aggravating circumstance. The burden is wholly upon the State to prove such a circumstance beyond a reasonable doubt. A reasonable doubt about an aggravating circumstance may arise from all the evidence, from any part of the evidence, or from a lack or failure of evidence. You may not consider any aggravating circumstance other than the three aggravating circumstances on which I've instructed you. And you may not consider an aggravating circumstance unless each and every one of you are convinced by the evidence beyond a reasonable doubt of the existence of that aggravating circumstance.

If you find that no aggravating circumstance has been proved beyond a reasonable doubt in a case, then you must return a verdict of life imprisonment without parole.

In that event, you need not concern yourself with the mitigating circumstances in the case.

If you find beyond a reasonable doubt that one or more of the aggravating circumstances on which I instructed you does exist in the case, then you must proceed to consider and determine the mitigating circumstances.

The law of this state provides a list of some of the mitigating circumstances, which you may consider, but that list is not a complete list of the mitigating circumstances you may consider.

I will now read to you a list of some of the mitigating circumstances that you may consider.

Number one, that the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. In considering this mitigating circumstance, you must take into consideration all of the factors connected with the defendant's state of mind at the time of the offense. I remind you that at this phase of the proceedings, you're not dealing with defenses, justifications, or excuses. Instead, you're concerned with mitigating circumstances. A mitigating circumstance is any factor, which in fairness supports a sentence of life in prison without possibility for parole rather than death. It would be up to you, of course, to determine how much weight to give to that particular matter as to all other matters.

Number Two, that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is not the same as his ability to know right from wrong generally or to know what he is doing at a given time or to know what he is doing is wrong. A person may indeed know that doing the act that constitutes a capital offense is wrong and still not appreciate its wrongfulness because he does not

fully comprehend or is not fully sensible to what he is doing or how wrong it is. Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate it does not have to have been totally obliterated. It is enough that it was substantially lessened or substantially diminished. Finally, this mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was substantially impaired, since a person may appreciate that his actions are wrong and still lack the capacity to refrain from doing them. It will be up to you, of course, to determine whether this particular mitigating circumstance exists and, if so, how much weight it should be given.

Number Three, that the defendant has no significant history of prior criminal activity. It will be up to you to determine whether this particular mitigating circumstance exists and, if so, how much weight should be given.

Mitigating circumstances are those factors or circumstances, which do not constitute a justification or excuse for murder but which in fairness should be considered in deciding between the punishments of life imprisonment without parole and death. Mitigating circumstances are anything about a defendant's life and background or about the circumstance of the offense, which in fairness, should be taken into account in deciding which of these two punishments should be imposed.

Any list of mitigating circumstances cannot and and does not limit your deliberations. You're free to and should consider any aspect of a defendant's

background and life and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

Nevertheless, here are some examples of factors, which the defense contends are mitigating and which are for you to determine whether or not they're supported by the evidence.

Whether the defendant suffered risk factors during his childhood such as being obese, being rejected by his peers, and being the primary caregiver to his ailing parents.

Whether the defendant experienced traumatic events during his life.

Whether the defendant suffers or suffered from the major mental illness, substance dependence disorder.

Whether the defendant suffers from the major mental illness, dysthymic disorder.

Whether the defendant exhibited signs of mental or emotional problems that went untreated.

Whether the defendant was detrimentally affected by the death of his parents.

Whether the defendant has demonstrated the capacity to love and care for another human being.

Whether the defendant has friends and relatives who love and care for him.

And whether the defendant is a low risk for futiure violence and would adapt well to prison environment.

It is up to you to determine whether any mitigating circumstances exist and, if so, what weight to give them, and whether they outweigh any aggravating circumstances that you find to exist. And I remind you that you may consider any additional mitigating circumstances that you find have been established.

You must consider all evidence that is offered in mitigation. Let me read that again. You must consider all evidence that is offered in mitigation. The weight you give to any particular mitigating circumstance is a matter for your moral and legal judgment. However, you may not refuse to consider any evidence in mitigation and thereby give it no weight. The weight it is to be given, however, is a matter solely for your discretion and judgment.

Mitigating circumstances differ from aggravating ones because you're not required to be convinced beyond a reasonable that a mitigating circumstance exists before you take that circumstance into account as you deliberate this case. If the factual existence of an offered mitigating circumstance is in dispute, the State shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. The burden of disaproving it by a preponderance of the evidence means that you are to consider that the mitigating circumstance does exist unless, taking the evidence as a whole, the State has convinced you that more likely than not the mitigating circumstance does not exist. Therefore, if there is a dispute over the existence of a mitigating circumstance, you should find and consider that mitigating circumstance unless you find the

evidence is such that it is more likely than not that the mitigating circumstance did not exist. Only an aggravating circumstance must be proved beyond a reasonable doubt. And, as I've stated to you many times, the burden is on the State to convince you from the evidence beyond a reasonable doubt and to a moral certainty that such an aggravating circumstance did exist. You must consider a mitigating circumstance if you believe there's evidence to support it. Also, unlike aggravation, with mitigation you re not required to unanimously agree in order to consider evidence mitigating. Instead, each of you must consider any evidence of mitigating circumstance and determine the weight it is to be accorded. You may not exclude mitigating circumstances from your consideration simply because as a jury you do not unanimously agree about one circumstance or a combination, of circumstances.

In reaching your finding concerning the aggravating and mitigating circumstances and in determining what the punishment should be, you must avoid any influence of passion, perjury other arbitrary factor. Neither sympathy for the victim nor sympathy for the defendant should guide your judgment. Your deliberation and verdict should be based upon the evidence you have seen and heard and the law on which I've instructed you. There's no room for influence of passion, prejudice, or any other arbitrary factors. While it is your duty to follow the instructions which the court has given you, no statement, question, or ruling or remark or any other expression that I've made at any time during this trial either during the guilt phase or

the sentence hearing is intended to indicate any opinion of what the facts are or what the punishment should be. It is your responsibility to determine the facts and recommend the punishment. And, in doing so, you should not be influenced in any way by what you may imagine to be my views on such subject.

The process of weighing aggravating and mitigating circumstances against each other in order to determine the proper punishment is not a mechanical process. Your weighing of the circumstances against each other should not consist of merely adding up the number of aggravating circumstances and comparing that number with the total number of mitigating circumstances.

The law of this state recognizes that it is possible in at least some situations that one or few aggravating circumstances might outweigh a larger number of mitigating circumstances. The law of this state also recognizes that it is possible at least in some situations that one or few mitigating circumstances might outweigh a larger number of aggravating circumstances. In other words, the law is that different circumstances be given different weights or values in determining the sentence in a case. And you the jury are to decide what weight or value is to be given to a particular circumstance in determining the sentence in light of all the other circumstances. You must do that in the process of weighing the aggravating circumstances against the mitigating circumstances.

As I informed you in the course of jury selection, your deliberations will result in a recommended

sentence. Do not, however, be misled about the importance of your decision. You're to assume, and with good reason, that the decision you reach will be the result in this case. Death by lethal injection is the ultimate punishment. It is irrevocable. Our law provides that it may be imposed only in those few murder cases, which are particularly aggravated in the manner that I've defined that term. The purpose of your deliberations at this point is to determine if any of the cases calls for the death sentence. You must presume that any sentence you recommend will be carried out to the fullest extent of the law. If you decide that James Ben Brownfield, Jr. is to be sentenced to life without parole, he will serve the remainder of his natural life in the state penitentiary. He will die in prison. If you decide that James Ben Brownfield, Jr. is to be sentenced to death, his life will be extinguished by lethal injection.

The procedure you must follow in deciding the sentence is not a mere counting process of a certain number of aggravating circumstances versus the number of mitigating.

In order to bring back a verdict recommending the punishment of death, at least ten of your number must vote for death. In other words, a verdict of death may be unanimous, eleven for death and one for life without parole, ten for death and two for life without parole. Any number less than ten cannot recommend the death penalty.

In order to bring back a verdict recommending a sentence of life imprisonment without parole, there must be a concurrence of at least seven of your number for that sentence. In other words, in

order for a verdict to be returned recommending imprisonment for life without parole, it must be either unanimous or eleven for life without parole and one for death, ten for life without parole and two for death, nine for life without parole and three for death, eight for life without parole and four for death, or seven for life without parole and five for death. Any number less than seven cannot recommend life without parole.

The fact that the determination of whether ten or more of you can agree to recommend a sentence of death or seven or more of you can agree to recommend a sentence of life imprisonment without parole can be reached by single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. You should hear and consider the views of your fellow jurors. Before you vote, you should carefully weigh, sift, and consider the evidence. And above all, realizing that a human life is at stake, you should bring to bear your best judgment on the sole issue, which is before you. That issue is whether the defendant should be sentenced to life imprisonment without parole or death.

In addition to either death or life imprisonment without parole, your verdict form must contain the numerical vote. And that does not mean who voted which way, but only the actual count that I just explained to you.

Ladies and gentlemen, after a full and fair consideration of all the evidence in the case you're convinced beyond a reasonable doubt and to a moral certainty that at least one aggravating circumstance does exist and you're convinced that

the aggravating circumstance or aggravating circumstances outweigh the mitigating circumstance or circumstances, your verdict should be a recommendation of death. However, if after a full and fair consideration of all the evidence in the case you determine that the mitigating circumstances outweigh any aggravating circumstance or circumstances that exist or you re not convinced beyond a reasonable doubt and to a moral certainty that at least one aggravating circumstance does exist, your verdict will be a recommended punishment of life imprisonment without parole.

You may retire to the jury room with the appropriate verdict forms. Thank you.

THE COURT: Are there any excepticns?

MR. RHODES: No, Your Honor.

MR. HARTLINE: No, Your Honor.

(At this time, the jury retires to deliberate.)

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No. 10-110

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES BEN BROWNFIELD,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari
to the Alabama Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

(Rephrased)

Should this Court grant certiorari to review Brownfield's argument -- that under *Ring v. Arizona*, 536 U.S. 584 (2002), Alabama's capital sentencing scheme violates the Sixth Amendment because it does not require that the jury find *every* aggravating circumstance underlying the sentencing decision -- where this claim is not worthy of this Court's certiorari review and, furthermore, Brownfield's argument is meritless?

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The Alabama Court of Criminal Appeals issued a published opinion in which it unanimously affirmed James Brownfield's capital murder convictions and resulting death sentence. *Brownfield v. State*, CR-04-0743, 2007 WL 1229388 (Ala. Crim. App. Apr. 27, 2007); Pet. App. 17a - 104a.

The Alabama Supreme Court also issued a published opinion, which again unanimously affirmed Brownfield's convictions and death sentence. *Ex parte Brownfield*, No. 1070255, 2009 WL 4980354 (Ala. Dec. 23, 2009); Pet. App. 3a - 16a.

STATEMENT OF JURISDICTION

The statement of jurisdiction contained on page 1 of Brownfield's petition for writ of certiorari is correct. As discussed below, however, Brownfield has failed to articulate adequate grounds for this Court to invoke its jurisdiction under Supreme Court Rule 10.

STATEMENT OF THE CASE

This case stems from James Brownfield's convictions for three counts of capital murder and his resulting death sentence. In the instant petition for writ of certiorari, Brownfield contends that Alabama's capital murder sentencing statute is constitutionally infirm under *Ring v. Arizona*, 536 U.S. 584 (2002) because it does not require that the

jury find *every* aggravating circumstance underlying the sentencing decision.

A. Alabama's Tripartite Capital Sentencing Scheme

Alabama's capital sentencing regime is tripartite. A trial for capital murder proceeds through three phases:

1. Guilt Phase

Before a defendant may be sentenced to death, the jury first must find him guilty, beyond a reasonable doubt, of a capital offense. Alabama has designated eighteen specific types of intentional murder as "capital offenses." *See* Ala. Code § 13A-5-40(a). Here, for instance, a jury convicted Brownfield of three counts of capital murder: (I) murder during the course of a burglary, *see* Ala. Code § 13A-5-40; (II) murder wherein Brownfield murdered three people "by one act or pursuant to one scheme or course of conduct," *see* Ala. Code § 13A-5-40(a)(10); and (III) murder of a person under the age of fourteen, *see* Ala. Code § 13A-5-40(a)(15). App. 3a, 17a - 18a.

2. Penalty Phase — Jury

Upon a defendant's conviction for a capital offense, the trial court conducts a separate sentencing hearing "to determine whether the defendant shall be sentenced to life imprisonment without parole or to death." Ala. Code § 13A-5-45(a). Pursuant to Section 13A-5-46, the sentencing hearing is conducted before a jury, which returns an advisory verdict.

In reaching its sentencing recommendation, the jury must determine whether the defendant committed the capital murder in conjunction with at least one aggravating circumstance. This is because "[u]nless at least one aggravating circumstance . . . exists, the sentence shall be life imprisonment without parole," not death. Ala. Code § 13A-5-45(f); *see also* Ala. Code 13A-5-46(e)(1) ("If the jury determines that no aggravating circumstances . . . exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole.").

Alabama has designated ten circumstances as aggravating. Ala. Code § 13A-5-49. Some of these aggravating circumstances correspond to, or overlap with, circumstances that make a murder capital in the first instance. *Compare, e.g.*, Ala. Code § 13A-5-40(a)(4) (defining as a "capital offense" murder committed during the course of a burglary), *with,* Ala. Code § 13A-5-49(4) (defining as an "aggravating circumstance" the fact that "[t]he capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, . . . burglary . . . ."). Accordingly, while the State "[has] the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances," Alabama's capital sentencing scheme makes clear that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing." Ala. Code § 13A-5-45(e); *see also* Ala. Code

§ 13A-5-50. In other words, a jury's verdict convicting a defendant of a type of capital murder characterized by a corresponding aggravator also, by definition, constitutes a finding by the jury that at least one aggravating circumstance (namely, the corresponding aggravator) exists. *See id.*

If the jury finds the existence of one or more aggravating circumstances, it must weigh the aggravating circumstances against any mitigating circumstances in the case.[1] *See* Ala. Code § 13A-5-46(e). Only if the jury finds that the aggravating circumstance(s) outweigh the mitigating circumstance(s) may it return a verdict recommending that the defendant be sentenced to death. Ala. Code § 13A-5-46(e)(3). If the jury does not find any aggravating circumstances, *see* Ala. Code § 13A-5-46(e)(1), or if it finds that the aggravating circumstances do not outweigh the mitigating circumstances, *see* Ala. Code § 13A-5-46(e)(2), it must return a recommendation of life in prison without parole. "The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors." Ala. Code § 13A-5-46(f). "The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors." *Id.* The jury's verdict, which "must be in writing," is required to specify only two things: (1)

---

[1] Except to the extent that its verdict necessarily indicates a finding of a particular aggravating circumstance (because that aggravator corresponds to an element of the charged offense), the jury is not required to specify which aggravating circumstance(s) or mitigating circumstance(s) it found to exist.

the jury's advisory sentencing recommendation and (2) the number of jurors who voted in favor of each possible verdict. *Id.* Here, the jury recommended, by a vote of 11 to 1, that Brownfield be sentenced to death.

3. Penalty Phase — Judge

Following the sentencing hearing, and after the jury has returned its advisory verdict, the trial court then determines the defendant's sentence. Ala. Code § 13A-5-47(a).

The trial court must make its own determination, based upon the evidence in the case, regarding the existence of any aggravating circumstance[s]. Ala. Code § 13A-5-47(d). As noted above, however, "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing." Ala. Code § 13A-5-45(e); *see also* Ala. Code § 13A-5-50. The trial court is required to "enter specific written findings concerning the existence or nonexistence of each [statutory] aggravating circumstance . . . , each [statutory] mitigating circumstance . . . , and any additional [nonstatutory] mitigating circumstances offered [by the defendant]." Ala. Code § 13A-5-47(d).

The trial court must also independently weigh the aggravating and mitigating circumstances. *See* Ala. Code § 13A-5-47(e). Pursuant to Alabama's sentencing scheme, "[i]n deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh

the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict. . . . While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court." *Id.* In the light of *Ring v. Arizona*, 536 U.S. 584 (2002), however, the trial court may not sentence a defendant to death unless there is evidence that the jury found the existence of at least one aggravating circumstance beyond a reasonable doubt.

B. Facts Of Brownfield's Crimes

Brownfield was charged with, convicted of, and sentenced to death for the capital murders of: his sister, Brenda McCutchin; Brenda's 3-year-old grandson, Joshua Hodges; and Brenda's husband, Latham McCutchin. The Alabama Court of Criminal Appeals recounted the facts of the crime as follows:

> At some time in the late evening hours of December 23, 2001, or the early morning hours of December 24, 2001, Brenda Whitehead McCutchin, Joshua Dewayne Hodges, and Latham Durwood McCutchin were murdered in their homes in Scottsboro, Alabama. At the time of their deaths, Brenda was forty-seven years old, Joshua was three years old, and Latham was sixty-four years old.
>
> After consuming Xanax pills on the night of December 23, 2001, the twenty-seven year old defendant, James Ben Brownfield, Jr., became enraged with his sister, Brenda Whitehead

McCutchin, over drugs and money. While Brenda and her grandson, Joshua Dewayne Hodges, were sleeping in their bed, the defendant decided to kill his sister and her estranged husband, Latham Durwood McCutchin. The defendant took a claw hammer into the room where Brenda and Joshua were sleeping and hit Brenda with it. When the defendant hit Brenda, Joshua awoke crying. At that time, the defendant began hitting both Brenda and Joshua with the claw hammer. Brenda suffered approximately twenty forceful blows to the head and other injuries to her body. Joshua suffered approximately sixteen blows to the head and other injuries to his body. Both Brenda and Joshua died from multiple blunt-force injuries. Before he left Brenda's house, the defendant attempted to burn the house with kerosene and a cigarette.

After killing Brenda and Joshua, the defendant took the claw hammer and a set of clean clothes and drove across town to the residence of his brother-in-law, Latham Durwood McCutchin. The defendant initially pretended a friendly visit with Latham but later inside the residence, the defendant informed Latham that he was going to kill him. The defendant and Latham struggled for the claw hammer with the defendant subduing Latham by hitting him with his fists and the hammer. Latham suffered numerous injuries. He suffered at least ten forceful blows to the

head with the claw hammer, bruising to the lower chest, arms, and hands, fractured ribs and a fractured vertebra. Later, the defendant stabbed Latham in the heart and cut his throat with a knife. Latham died from multiple blunt-force injuries. After killing Latham, the defendant showered and dressed in the clean clothes. He gathered the soiled clothes, claw hammer, and knife and placed them in a garbage bag that he found at Latham's house.

The defendant left Latham's house and went to a Christmas party where he saw friends and acquaintances. He told his friend, Nick Logan, that he was moving to Tennessee because he and Brenda had argued and she had kicked him out of the house. Later, the defendant left the party and drove toward Tennessee to Stevenson, Alabama. He placed the garbage bag of evidence in a dumpster in Stevenson and drove back to Scottsboro. The defendant had contact with friends throughout the day of December 24, 2001. The night of December 24, 2001, the defendant went to Tammy Farmer's apartment. During conversations with Tammy, his girlfriend, the defendant confessed to the murders of Brenda, Joshua, and Latham.

Concerned about his father, Rodney McCutchin traveled to Latham McCutchin's house. Rodney and his son found the body of Latham and called 911. The Scottsboro Police Department immediately began an

> investigation into the death of Latham. During the investigation, they obtained information that implicated Brenda McCutchin and her brother, the defendant, James Ben Brownfield, Jr. On the morning of December 25, 2001, the Scottsboro Police Department obtained a search warrant to search the home of Brenda McCutchin. Upon searching the home, the police discovered the bodies of Brenda and her grandson, Joshua. The Scottsboro Police Department intensified their search for Brenda's car and the defendant.
>
> At approximately 10:00 A.M. on December 25, 2001, the Scottsboro Police Department located Brenda's car and the defendant at the apartment of defendant's girlfriend, Tammy Farmer. The defendant was apprehended and transported to the Scottsboro Police Department. On December 25 and 26, 2001, the defendant gave Investigators Robert Petty and Doug Hood of the Scottsboro Police Department a statement of confession to the murders.

Brownfield v. State, CR-04-0743, 2007 WL 1229388 at *1 - 2 (Ala. Crim. App. Apr. 27, 2007) (quoting the trial court's sentencing order); Pet. App. 18a - 21a.

In short, Brownfield, wielding a claw hammer, "savagely bludgeoned to death his 47-year-old sister and her 3-year-old grandson as they lay helpless in their beds." *Brownfield*, 2007 WL 1229388 at *33; Pet. App. 100a. He then went to the home of his 64-year-old brother-in-law, who he brutally murdered

using the same claw hammer, as well as a knife. *Id.* at *31 - *32, *35; Pet. App. 94a-101a, 103a-104a. Based upon the savageness of the murders and the suffering experienced by the victims the Alabama Court of Criminal Appeals held: "Clearly, there was sufficient evidence from which the jury could conclude that the manner of death in this case was especially heinous, atrocious, or cruel when compared to other capital cases. Thus, this aggravating circumstance was correctly found by both the jury and the circuit court." *Id.* at *33; Pet. App. 101a.

C. Proceedings Below

Brownfield was charged with three separate counts of capital murder for:

(I) the murder of Latham McCutchin, which was made capital pursuant to Ala. Code § 13A-5-40 because it was committed during a burglary;

(II) the murders of three people -- Brenda McCutchin, Joshua Hodges, and Latham McCutchin -- which constituted capital murder pursuant to Ala. Code § 13A-5-40(a) (10) because these murders occurred "by one act or pursuant to one scheme or course of conduct"; and

(III) the murder of Joshua Hodges, which was made capital pursuant to Ala. Code § 13A-5-40(a) (15) because the victim was under the age of fourteen.

Pet. App. 3a, 17a - 18a.

At trial, "the evidence of Brownfield's guilt as to the capital offenses" was, as the Alabama Supreme Court reiterated, "overwhelming." Pet. App. 15a. The jury found him guilty of all three counts of capital murder. Pet. App. 22a. After hearing the evidence and arguments in the penalty phase of the trial, the jury recommended, by a vote of 11 to 1, that Brownfield be sentenced to death. *Id.* The trial judge accepted the jury's recommendation and sentenced Brownfield to death. *Id.*

Brownfield filed a direct appeal challenging his convictions and death sentence. Among the numerous claims he raised in the Alabama Court of Criminal Appeals, Brownfield argued that "Alabama's statutory capital-sentencing scheme is constitutionally infirm for two reasons: (1) that pursuant to *Ring v. Arizona*, the jury, and not the trial judge, must make the determination as to whether the aggravating circumstances outweigh the mitigating circumstances; and (2) that the jury's recommendation of death must be unanimous." *Brownfield*, 2007 WL 1229388, at *28 (internal citation omitted); Pet. App. 86a (internal citation omitted); *see* Pet. App. 111a - 118a. The court rejected this argument, holding that it is meritless. *Id.* at *28 - *31; Pet. App. 86a - 94a.

On April 27, 2007, the Court of Criminal Appeals issued an opinion unanimously affirming Brownfield's convictions and sentence. *Brownfield*, 2007 WL 1229388; Pet. App. 17a - 104a.

Brownfield then filed a petition for writ of certiorari in the Alabama Supreme Court, which

granted certiorari review on March 16, 2009. Brownfield raised several arguments in his brief to the Alabama Supreme Court. Among these was a one-paragraph claim challenging the constitutionality of Alabama's capital sentencing scheme. Pet. App. 107a - 108a. In this paragraph, Brownfield asserted that the sentencing scheme is unconstitutional because it does not require that the jury's advisory sentencing recommendation be unanimous. Pet. App. 107a - 108a ("Although this Court routinely upholds death sentences imposed after nonunanimous jury recommendations, the Appellant maintains that to do so is violative of the U.S. Supreme Court's holding in *Ring*, and of his Sixth Amendment rights."). The paragraph also asserted, in a single sentence and without any supporting argument, that "[t]his Court (sic) erroneously found that the jury should not decide what relative weight to assign the aggravating and mitigating circumstances." Pet. App. 108a.

The Alabama Supreme Court unanimously affirmed Brownfield's convictions and death sentence in a published opinion issued on December 23, 2009. *Ex parte Brownfield*, No. 1070255, 2009 WL 4980354 (Ala. Dec. 23, 2009); Pet. App. 3a - 16a. In this opinion, the court did not consider Brownfield's challenge to Alabama's capital murder sentencing scheme. Rather, it noted, "[w]e granted certiorari review to determine a material question of first impression concerning Rule 11.2(b) [of the Alabama Rules of Criminal Procedure, which governs the admissibility of testimony regarding statements made by a defendant during a mental examination],"

Ex parte Brownfield, 2009 WL 4980354, at *1; Pet. App. 4(b), and the opinion only addressed this issue of first impression.

REASONS FOR DENYING THE PETITION

This Court Should Decline To Review Brownfield's Argument – That Alabama's Capital Sentencing Scheme Is Constitutionally Infirm Because It Does Not Require The Jury To Find *Every* Aggravating Circumstance Underlying The Sentencing Decision – Because This Argument Is Not Worthy Of Certiorari Review And Furthermore, It Is Meritless.

The instant petition for writ of certiorari fails to present a colorable claim for relief, much less a claim presenting such "compelling reasons," Sup. Ct. R. 10, as to warrant this Court's attention. Brownfield contends that he was sentenced to death in violation of his rights under the Sixth Amendment. Specifically, he argues that under *Ring v. Arizona*, 536 U.S. 584 (2002), Alabama's capital sentencing scheme violates the Sixth Amendment because it does not require that the jury find *every* aggravating circumstance underlying the sentencing decision. As discussed below, this Court should deny certiorari for at least two separate reasons: (1) Brownfield's argument is not worthy of certiorari review and (2) Brownfield's argument is meritless.

A. Brownfield's Argument Is Not Worthy Of Certiorari Review.

Because Brownfield's petition for a writ of certiorari does not present a sufficient basis for this Court to invoke its jurisdiction under Supreme Court Rule 10, it is due to be denied. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10; *see also Fay v. Noia*, 372 U.S. 391, 436 (1963). Here, Brownfield has failed to advance any compelling reason for this Court to review his case, and indeed, none exists.

This Court has repeatedly denied certiorari review of the claim Brownfield raises in the instant petition and of substantially similar claims. *See, e.g. Mashburn v. Alabama*, 129 S.Ct. 2736 (2009); *Marshall v. Alabama*, 130 S.Ct. 635 (2009); *Clark v. Alabama*, 545 U.S. 1130 (2005); *McNabb v. Alabama*, 543 U.S. 1005 (2004); *Lee v. Alabama*, 543 U.S. 924 (2004); *Hodges v. Alabama*, 540 U.S. 986 (2003); *Waldrop v. Alabama*, 540 U.S. 968 (2003). Nothing has changed, and Brownfield has failed to assert, much less establish, any valid reason for this Court to reconsider its previous decisions declining to review this issue. Accordingly, this Court should deny certiorari.

Certiorari should also be denied because the argument Brownfield asserts in the instant petition was not addressed by, or properly presented to, the Alabama Supreme Court. Although Brownfield seeks "review [of] the judgment of the Supreme Court of Alabama," Pet. at 1, that court did not, in

fact, address the argument that Brownfield raises in the instant petition, *see Ex parte Brownfield*, 2009 WL 4980354; Pet. App. 3a - 16a. Even more importantly, Brownfield did not properly present his current argument to the Alabama Supreme Court. *See* Pet. App. 107a - 108a. Notably, although his brief to that court did contain a one-paragraph claim challenging the constitutionality of Alabama's capital sentencing scheme, Brownfield did not assert the specific argument that he now raises in the instant petition for writ of certiorari -- that Alabama's capital sentencing scheme is unconstitutional because it does not require a jury to find every statutory aggravating circumstance underlying the sentencing decision. *See* Pet. App. 107a - 108a. Brownfield's failure to properly present his argument to the Alabama Supreme Court is fatal. *See* 28 U.S.C. § 1257(a); *Howell v. Mississippi*, 125 S. Ct. 856, 858 (2005) ("This Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'"); R. Stern, et. al., *Supreme Court Practice* § 3.16, at 168 (8th ed. 2002) ("It is essential to the jurisdiction of the Supreme Court under § 1257(a) that a substantial federal question has been properly raised in the state court proceedings."). This, by itself, is a sufficient reason to deny certiorari.

Furthermore, even if the Alabama Supreme Court had addressed the argument Brownfield advances in the instant petition (which is not the case), and even

if Brownfield had properly presented this argument to the Alabama Supreme Court (which he failed to do), certiorari would not be warranted. The circumstances of Brownfield's case make his claim particularly weak. Brownfield argues that Alabama's capital sentencing scheme, under which the judge is the final sentencing authority, violates the Sixth Amendment because it permits the judge to independently find the existence of aggravating circumstances (as opposed to requiring that the jury make every finding of fact underlying the sentencing decision). In Brownfield's case, however, the jury recommended a sentence of death by a vote of 11 to 1. His death sentence was not the result of judicial override. On the contrary, the trial court accepted the jury's recommendation and sentenced him accordingly. Brownfield thus suffered no injury in fact as a result of the judge's involvement in this case. Even if this Court were to accept Brownfield's argument, Brownfield could not benefit from that ruling because the jury in his case independently determined that he should be sentenced to death.

Brownfield's claim is not worthy of certiorari; therefore, this Court should deny his petition.

B. Certiorari Should Be Denied Because Brownfield's Argument Is Meritless.

In addition to being unworthy of this Court's certiorari review, Brownfield's challenge to the constitutionality of Alabama's capital murder sentencing scheme is meritless. Contrary to his argument, *Ring* does not require that the jury make every finding of fact underlying the sentencing

decision. Under *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589; accord *Apprendi*, 530 U.S. at 490. In capital cases, *Ring* requires that the jury (as opposed to the trial judge) find any fact which is necessary to expose the defendant to the death penalty. *Ring*, 536 U.S. at 609.[2]

"Alabama law requires the existence of only one aggravating circumstance in order for a defendant to be sentenced to death." *Ex parte Waldrop*, 859 So. 2d 1181, 1190 (Ala. 2002) (citing Ala. Code 1975, § 13A-5-45(f)). Thus, in accordance with *Ring*, a defendant cannot be sentenced to death pursuant to Alabama's

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[2] It is worth noting that *Ring* explicitly refrained from holding that the jury must be the final decision-maker in death penalty cases. Further, as Justice Scalia noted in his concurrence:

> What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so - by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Ring, 536 U.S. at 612-13 (Scalia, J., concurring) (emphasis in original).As long as the jury finds the facts that are necessary to establish death as the maximum available sentence, *Ring* is satisfied. *Ring* has nothing to say about how or by whom the sentence is ultimately determined.

capital sentencing scheme unless the jury finds the existence of at least one aggravating factor. *See Ring*, 536 U.S. at 609; Ala. Code § 13A-5-45(f). *Ring* does not, however, extend to the finding of additional aggravators, or to the finding of mitigators, or to the weighing of both and the resulting decision as to the appropriate sentence. Rather, once the jury finds an aggravating circumstance -- thus exposing the defendant to death as a maximum punishment -- the trial judge may make any additional findings and perform any additional legal/moral calculus that state law permits, without running afoul of *Ring*.

When a defendant is already eligible for the death penalty -- as he is in Alabama upon the jury's finding of a single aggravating circumstance -- no subsequent finding or determination can increase his maximum sentence, for the obvious reason that there is no penalty greater than death. The judge and jury may ultimately find different aggravating and mitigating circumstances to exist, or they may reach different conclusions when weighing the aggravating and mitigating circumstances. Under *Apprendi* and *Ring*, these possibilities are constitutionally irrelevant, because they do not increase the maximum sentence that the defendant may suffer as a result of the jury's verdict.

In the case at hand, the jury made all of the factual determinations necessary to set Brownfield's maximum punishment at death. As is the case here, when a capital offense corresponds to an aggravating circumstance, the jury's guilty verdict necessarily establishes the existence of the aggravating circumstance beyond a reasonable doubt. *See* Ala.

Code § 13A-5-45(e) ; Ala. Code § 13A-5-50. Thus, as the Alabama Court of Criminal Appeals noted, "in returning guilty verdicts as to the charged capital offense of burglary-murder and the capital offense of the murder of two or more people during one act or pursuant to one scheme or course of conduct, the jury of necessity unanimously found that two statutory aggravating circumstances had been proven beyond a reasonable doubt, i.e., § 13A-5-49 (3) and (4), Ala.Code 1975." *Brownfield*, 2007 WL 1229388, at *30. These aggravating circumstances were sufficient to expose Brownfield to the death penalty. *See* Ala. Code § 13A-5-45(f) (indicating that only one aggravating circumstance must exist in order to impose a sentence of death).

The jury thus set Brownfield's maximum sentence at death when it returned its verdict finding him guilty of capital offenses that corresponded to statutory aggravating circumstances. The trial court's subsequent findings regarding the existence of aggravating circumstances, including its determination that the capital offense was especially heinous, atrocious, or cruel, did not operate to increase this maximum sentence. The trial court therefore could not have violated *Ring* by any of its fact-findings.

Apprendi and *Ring* are violated when a judge "inflicts punishment that the jury's verdict alone does not allow." *Blakely v. Washington*, 124 S. Ct. 2531, 2537 (2004). That did not happen here; the jury's verdict alone -- which also resulted in the finding of the corresponding aggravating circumstances -- rendered Brownfield death-eligible.

Brownfield's death sentence satisfies the requirements of *Ring*. Consequently, he is not entitled to any relief, and this Court should deny his petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny Brownfield's petition for writ of certiorari.

Respectfully submitted,

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No. 10-110

In The
Supreme Court of the United States

JAMES BEN BROWNFIELD,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITIONER'S REPLY BRIEF IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

This Court's intervention is necessary to resolve a split in capital cases that has developed among state supreme courts in the wake of *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296 (2004). Consistent with *Ring* and *Blakely*, several state supreme courts have correctly concluded that the Sixth Amendment requires a jury determination of aggravating facts that expose a defendant to a death sentence. Justices of this Court have suggested the same interpretation. *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (Scalia, J., joined by Thomas, J. and Rehnquist, C.J., stating that, under *Ring*, "the Sixth Amendment requires that a jury, and not a judge, find the existence of *any aggravating circumstances*, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt" (emphasis added)). Yet the supreme courts of Alabama and other states have erroneously held that the Sixth Amendment permits a sentencing judge to find an aggravating fact necessary to impose the death penalty, provided that the jury finds a single aggravating fact (which may be insufficient, on its own, to make a capital sentence available). In Mr. Brownfield's case, the sentencing judge found an aggravating fact, which she then used to determine that Mr. Brownfield could be exposed to the maximum punishment of – and deserved – death.

This Petition presents an ideal opportunity for the Court to address a significant constitutional error in capital cases. First, this is a direct appeal, and Mr.

Brownfield has properly preserved the issue. Second, the violation of Mr. Brownfield's Sixth-Amendment right was not harmless. The judge-found aggravating fact was central to Mr. Brownfield's exposure to the maximum sentence of death. In addition, it is futile to speculate what an Alabama jury might have done in the absence of constitutional error because (1) Alabama lacks any procedure for enabling juries to make binding, factual determinations during the sentencing phase of a capital case, and (2) even if Alabama had such a procedure, the advisory jury's determination in this case would have been ineffectual under Alabama law to sentence Mr. Brownfield because that determination was not unanimous.

The Court should grant certiorari in order to prevent sentencing judges in capital cases from imposing maximum sentences that the jury's factual findings, standing alone, do not allow.

I. CERTIORARI IS APPROPRIATE TO RESOLVE A SPLIT AMONG THE STATE SUPREME COURTS REGARDING WHETHER JUDGE-FOUND FACTS CAN, CONSISTENT WITH THE SIXTH AMENDMENT, INCREASE LEGISLATIVELY PRESCRIBED MAXIMUM SENTENCES FROM LIFE IN PRISON TO DEATH.

Certiorari is appropriate because state supreme courts are applying conflicting standards regarding whether a defendant may, consistent with the Sixth Amendment, be exposed to a maximum punishment

of death based upon aggravating facts found only by a judge. *See* U.S. SUP. CT. R. 10 (listing as possible basis for grant of certiorari that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort"). Neither the existence nor the significance of this split of authority is contested by Respondent.

On one side of the divide stand supreme courts in Colorado, Indiana, and Nebraska, which have correctly held that this Court's decisions in *Ring* and *Blakely* require a jury to find all aggravating facts used by a judge in imposing the death penalty. *See, e.g.*, *People v. Montour*, 157 P.3d 489, 497 (Colo. 2007) ("Because a defendant is not eligible for the death penalty until all aggravating factors are weighed against all mitigating factors, the presence of one *Blakely*-exempt aggravating factor standing alone does not make a capital defendant eligible for the death penalty. . . . Capital defendants have a right to a jury trial on all aggravating facts used to determine death eligibility."); *Ritchie v. State*, 809 N.E.2d 258, 265 (Ind. 2004) ("The Supreme Court has now made clear that statutory aggravators in Indiana's Death Penalty law are the functional equivalent of elements of a crime, and must be found by a jury beyond a reasonable doubt."); *State v. Gales*, 658 N.W.2d 604, 624 (Neb. 2003) ("*Ring v. Arizona* therefore requires that in order to fulfill the guarantee of rights conferred by the Sixth Amendment, the existence of any aggravating circumstance utilized in the imposition of

[the defendant's] sentence of death, other than a prior criminal conviction, must be determined by a jury." (internal citation omitted)).

On the other side of the divide stand supreme courts in Alabama, Florida, and Delaware, which have held that this Court's decisions in *Ring* and *Blakely* allow a judge to increase a sentence from life in prison to death based upon aggravating facts not found by the jury. *See, e.g., Ex parte Hodges*, 856 So.2d 936, 944 (Ala. 2003) (holding that jury's finding of one aggravating fact during innocence/guilt phase of trial was sufficient to satisfy Sixth Amendment, regardless of whether sentencing judge considered other aggravating facts not found by the jury); *Brice v. State*, 815 A.2d 314, 321 (Del. 2003) (accepting State's argument that *Ring* "merely requires the jury to find the existence of one statutory aggravating factor before the judge may consider all aggravating" facts); *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003) (rejecting Sixth-Amendment argument under *Ring* where judge, after recognizing defendant's prior violent felony aggravator conviction, proceeded to find two important aggravating facts that were weighed in calculus of death).

This sharp split of authority among the states' highest courts cannot be resolved without this Court's intervention. The Court should therefore grant this Petition in order to correct the constitutional analysis of those jurisdictions that, contrary to this Court's holdings in *Ring* and *Blakely*, permit judge-found

facts to increase legislatively prescribed maximum sentences in capital cases.[1]

II. THIS CASE PRESENTS A COMPELLING OPPORTUNITY TO CONSIDER THE QUESTION PRESENTED

At least two aspects of this case make it ideal to address the fundamental Sixth-Amendment issue raised in this Petition.

First, the case is on direct review, and Mr. Brownfield properly preserved the question raised in this Petition by presenting it to the Alabama courts. Before both the Alabama Court of Criminal Appeals and the Alabama Supreme Court, Mr. Brownfield argued that the trial judge's imposition of the death penalty based upon judge-found facts violated the Sixth Amendment in light of this Court's holding in *Ring*. App. 107a-108a, 111a-119a. Mr. Brownfield can therefore raise any argument in support of that claim before this Court. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) ("Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of

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[1] Respondent argues that the denial of certiorari by this Court with respect to allegedly "similar claims" in prior, unrelated cases warrants denial in this case. Respondent's Br. at 14. But "'[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)).

that claim here."). Moreover, the Alabama Court of Criminal Appeals rejected the specific argument raised in this Petition. It held that "the limited mandates of *Ring* have been satisfied in this case, because the jury unanimously found at least one statutory aggravating circumstance, making Brownfield eligible for the death penalty." App. 92a-93a. Although the Alabama Supreme Court subsequently declined to address Mr. Brownfield's argument, its decision does not undermine Mr. Brownfield's preservation of the issue. *See United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below. . . . [T]his rule operates (as it is phrased) in the disjunctive. . . ." (internal quotation marks omitted)).

Second, the violation of Mr. Brownfield's Sixth-Amendment right was not harmless. The judge-found aggravating fact played a central role in the imposition of the death penalty. *See* App. 149a-153a. It is pure speculation to suggest that Mr. Brownfield would have been sentenced to death in the absence of this judge-found fact. To the contrary, the jury's inability to reach a unanimous recommendation regarding Mr. Brownfield's sentence emphasizes the importance of each fact in the sentencing calculus.

In addition, the constitutional error was not harmless because (as Respondent does not contest) Alabama lacks a procedural mechanism for obtaining binding, jury-determined facts during the sentencing phase. *See Washington v. Recuenco*, 548 U.S. 212, 218

(2006) ("If . . . Washington law does not provide for a procedure by which [the] jury could have made a finding pertaining to [the sentencing factor], that . . . suggests that respondent will be able to demonstrate that the *Blakely* violation *in* [the] *particular case* was not harmless."). Alabama imposes numerous obstacles that prevent a jury's factual determinations at sentencing. First, as Respondent explains, in Alabama "the jury is not required to specify which aggravating circumstance(s) or mitigating circumstance(s) it found to exist." Respondent's Br. at 4 n.1. Second, even assuming that the jury in Mr. Brownfield's case had made specific findings of aggravating facts during the sentencing phase, its findings would not have been binding on the final arbiter of Mr. Brownfield's sentence – the judge. *See* Respondent's Br. at 5-6. *See also* ALA. CODE § 13A-5-47(e) ("In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist. . . . While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court."); *Ex parte Waldrop*, 859 So.2d 1181, 1193 (Ala. 2002) (affirming court's imposition of death sentence over jury's recommendation of life). Finally, even assuming (contrary to Alabama law) that the jury's sentencing recommendation had been binding, this recommendation would have been insufficient to impose the death penalty upon Mr. Brownfield because the jury was unable to reach a unanimous verdict, as is required under Alabama law for an operative jury verdict in a criminal case. *See*

ALA. R. CRIM. P. 23.1(a) ("The verdict of the jury shall be unanimous. . . .").

The Court should therefore grant this Petition, which raises a significant constitutional issue that has been properly preserved and whose violation was not harmless in this case.

III. ALABAMA LAW CONTRAVENES THIS COURT'S PRECEDENTS AND MUST BE CORRECTED TO AVOID FURTHER CONSTITUTIONAL ERRORS IN CAPITAL CASES.

This Court has made clear that a jury must find those facts that are necessary and sufficient to expose a defendant to a maximum sentence. *See Blakely*, 542 U.S. at 303-04 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority."); *Sattazahn*, 537 U.S. at 111 (Scalia, J., joined by Thomas, J. and Rehnquist, C.J., stating that, under *Ring*, "the Sixth Amendment requires that a jury, and not a judge, find the existence of *any aggravating circumstances*, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt" (emphasis added)); *Ring*, 536 U.S. at 589

("Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). Under Alabama law, a jury's finding of a sole aggravating fact is a necessary, but not sufficient, condition to expose a defendant to a capital sentence. In order for the death penalty to be available as a sentencing option, the aggravating fact(s) found by the judge must outweigh any mitigating circumstances.[2] Where, as in Mr. Brownfield's case, a judge relies upon an aggravating fact that was not found by the jury in order to increase a defendant's sentence from life in prison to death, the judge inflicts punishment that the jury's verdict does not allow, in violation of the Sixth Amendment.[3]

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[2] *See* ALA. CODE § 13A-5-45(f) ("Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole."); *Ex parte Waldrop*, 859 So.2d at 1191 (stating that a trial court "may opt to impose the death penalty" only after the finding of aggravating fact(s) that outweigh(s) mitigating circumstances); *Ex parte Woodard*, 631 So.2d 1065, 1071 (Ala. Crim. App. 1993) ("A greater punishment – death – may be imposed on a defendant convicted of a capital offense, but only if one or more of the aggravating circumstances enumerated in § 13A-5-49 is found to exist and that aggravating circumstance(s) outweighs any mitigating circumstance(s) that may exist." (citing ALA. CODE §§ 13A-5-45(f), 13A-5-46(e), 13A-5-47(e) (emphases in original))).

[3] This Petition does not question that, once a jury has found facts legally essential to expose a defendant to a statutory sentencing range, then the sentencing judge may consider additional factors in determining what sentence to impose, so long as the sentence falls within the established range.

Contrary to this precedent and reasoning, Alabama uses an erroneous conception of a defendant's "maximum sentence," which is allegedly reached in capital cases when a jury finds any factual prerequisite in favor of death, regardless of whether that fact is sufficient to outweigh mitigating circumstances. Respondent asserts that it is "constitutionally irrelevant" that "[t]he judge and jury may ultimately find different aggravating and mitigating circumstances to exist" and that "once the jury finds an aggravating circumstance . . . the trial judge may make any additional finding . . . without running afoul of *Ring*." Respondent's Br. at 18. That argument is consistent with the decision of the Alabama Court of Criminal Appeals in Mr. Brownfield's case and with precedent of the Alabama Supreme Court. *See* App. 92a-93a ("[T]he limited mandates of *Ring* have been satisfied in this case, because the jury unanimously found at least one statutory aggravating circumstance, making Brownfield eligible for the death penalty."); *Ex parte Waldrop*, 859 So. 2d at 1190. But "*Apprendi* . . . ensur[es] that the judge's authority to sentence derives wholly from the jury's verdict." *Blakely*, 542 U.S. at 306. In giving the judge *carte blanche* to find any facts necessary to impose the death penalty once the jury has engaged in some fact-finding (regardless of the relevance of the jury's fact-finding in determining the maximum sentence to which the defendant is exposed), Respondent and Alabama's courts have reduced the jury to an ornamental accessory that is excluded from determining the factual basis of a capital defendant's maximum sentence. Alabama's

interpretation of the Sixth Amendment undermines the right to a jury trial by guaranteeing jury fact-finding on issues potentially inconsequential to the maximum sentence, while preserving the judge's authority to find facts that expose and condemn a defendant to death. *See Ring*, 536 U.S. at 609 ("The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.").

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant certiorari to the Alabama Supreme Court and declare his rights were violated.

Respectfully submitted,

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